(18)

No. 90-1090-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, et al., Petitioners
v.
National Center for Immigrants' Rights, Inc., et al.

Docketed:
January 7, 1991

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Schey,Peter A., Gzesh,Susan, Perillie,Patrice

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Entry	Date	Note	Proceedings and Orders
1	Nov 21 1990	G	Application (A90-388) to extend the time to file a petition for a writ of certiorari from December 6, 1990 to January 21, 1991, submitted to Justice O'Connor.
2	Nov 23 1990		Application (A90-388) granted by Justice O'Connor extending the time to file until January 5, 1991.
3	Dec 26 1990	D	Application (A90-388) to extend further the time to file a petition for a writ of certiorari from January 5, 1991 to January 21, 1991, submitted to Justice O'Connor.
4	Dec 31 1990		Application (A90-388) denied by Justice O'Connor.
5	Jan 7 1991	G	Petition for writ of certiorari filed.
6	Jan 7 1991		Appendix of petitioner filed.
8	Jan 25 1991		Order extending time to file response to petition until March 9, 1991.
9	Mar 9 1991		Brief of respondents Natl. Center for Immigrants' Rights, et al. in opposition filed.
10	Mar 13 1991		DISTRIBUTED. March 29, 1991
11	Mar 19 1991	X	Reply brief of petitioner INS, et al. filed.
12	Apr 1 1991		Petition GRANTED. limited to Question 2 presented by the petition.
			**********
13	May 13 1991		Joint appendix filed.
14	May 13 1991		Brief of petitioners INS, et al. filed.
16	May 29 1991		Order extending time to file brief of respondent on the merits until July 12, 1991.
17	Jul 12 1991		Brief amicus curiae of International Human Rights Law Group filed.
18	Jul 12 1991		Brief amicus curiae of American Bar Association filed.
19	Jul 12 1991		Brief amicus curiae of American Immigration Lawyers Association filed.
20	Jul 12 1991		Brief of respondent Natl. Center for Immigrants' Rights, Inc., et al. filed.
21	Aug 21 1991		CIRCULATED.
22	Sep 3 1991	X	Reply brief of petitioner Natl. Center for Immigrants' Rights, et al. filed.
23	Sep 5 1991		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 13, 1991.(4TH CASE)
24	Sep 10 1991		Record filed.
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No. 90-1090-CFX

Entry	Date	Note	Proceedings and Orders
			District Court, Central District of California.
25	Sep 11 1991		Record filed.
		*	Certified record and briefs - United States Court of Appeals for the Ninth Circuit.
26	Nov 13 1991		ARGUED.

PETITION FOR WRIT OF CERTIORARI

90-1090

No. (1)

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JAN 7 1991
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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

A provision of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(1), authorizes the release of aliens, pending determination of deportability, on bonds containing "such conditions as the Attorney General may prescribe." The provision also limits judicial review of "any determination of the Attorney General concerning * * * release on bond" to "habeas corpus proceedings." The questions presented are:

1. Whether this provision bars the exercise of federal question jurisdiction, under 8 U.S.C. 1329 or 28 U.S.C. 1331, over an action challenging the Attorney General's promulgation of a rule concerning a condition of release of aliens on bond pending a final decision on deportability.

2. Whether the provision prohibits promulgation of a rule generally requiring that release bonds contain a condition forbidding unauthorized employment pending determination of deportability.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are the Immigration and Naturalization Service; Gene McNary, Commissioner of the Immigration and Naturalization Service; and Richard Thornburgh, Attorney General of the United States. Respondents, plaintiffs below, are National Center for Immigrants' Rights, Inc.; American Friends Service Committee; El Rescate (The Rescue); Central American Refugee Center; El Concilio Manzo; Willamette Valley Immigration Project; Southern California Ecumenical Council; Centro Presente, Inc.; Tucson Ecumenical Council; Hermandad Nacional Mexicana; Coalition for Visas and Rights for the Undocumented; Centro Para Immigrantes de Houston; International Institute of Boston; Center for Immigrants Rights; Imperial Valley Immigration Project; United Automobile, Aerospace and Agricultural Implement Workers of America Local 645; and the following individuals: Santos Adalberto Lopez-Duran, Julio Fernando Lorine-Garcia, Raphael Antonio Perez, Raul Armando Marroquin, Ricardo Delgado Osegueda (or Oseguena), Mirza Odilia Hernandez Diaz, Maximiliano Martinez Oriana (or Orellana), Rosa Maria Tovar Rivas (or Tobar Rivas), Dennis Gillermo Vanegas, Antonio Mendoza Romero, Migel (or Miguel) Angel Gomez Vasquez (or Gomez-Vasquez), Fidel Angel Henriquez Duran, Daniel Antonio Garcia Reyes, Ana Berta Martinez, Dionisio Navarette Marlos (or Merlos), and Jane Doe I (an alien who claims to be deterred from filing for benefits with the Immigration and Naturalization Service because of fear that the regulation at issue would result in her indefinite detention).

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OCTOBER TERM, 1990

No.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, its Commissioner Gene McNary, and Attorney General Richard Thornburgh, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-60a, is reported at 913 F.2d 1350. An earlier opinion in the same appeal, regarding an issue of appellate jurisdiction, App. 61a-65a, is reported at 892 F.2d 814. The opinion of the district court, App. 66a-70a, is unreported.

Several additional opinions were issued by the courts below before this Court's 1987 order, which granted our previous petition for a writ of certiorari, vacated the judgment below, and remanded the case to the court of appeals. See 481 U.S. 1009. The court of appeals decision vacated by this Court, App. 71a-80a, is reported at 791 F.2d 1351. The district court order from which that

appeal was taken, App. 81a-95a, is reported at 644 F. Supp. 5. An earlier opinion of the court of appeals affirming the issuance of a preliminary injunction, App. 96a-108a, is reported at 743 F.2d 1365. The district court's opinion granting the preliminary injunction, App. 109a-118a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1990. On November 23, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 5, 1991 (a Saturday).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 103(a), 212(a)(14), 241(a)(1), and 242(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1103(a), 1182(a)(14), 1251(a)(1), and 1252(a)(1), are reproduced at App. 119a-122a. 8 C.F.R. 103.6 and 274a.12 are reproduced at App. 122a-136a. The notice promulgating the regulation at issue here, 48 Fed. Reg. 51,142-51,144 (1983) is reproduced at App. 137a-149a.

STATEMENT

Respondents—non-profit organizations, a union local, and individuals in deportation proceedings—filed an action in 1983 challenging a regulation of the Attorney General. The regulation provides that when an alien is released from custody pending deportation or exclusion proceedings, the bond obtained to secure the alien's release must include a condition forbidding unauthorized employment. Ten days after the regulation took effect, the district court issued a nationwide preliminary injunction barring its enforcement. The court of appeals affirmed, subject to certification of a nationwide class. On remand, the district court certified a nationwide class of "all persons who have been or may in the future be denied the right to work" by the regulation, App. 3a,

and made the nationwide injunction permanent. The court of appeals affirmed the permanent injunction.

Because the nationwide injunction seriously restricted the Attorney General's authority to protect American workers against unauthorized employment, the Solicitor General filed a petition for a writ of certiorari. This Court granted the petition, vacated the lower court's judgment, and remanded the case for further consideration in light of the Immigration Reform and Control Act of 1986 (IRCA). On remand, the district court reentered its nationwide injunction and a divided panel of the court of appeals affirmed.

1. a. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, governs all aspects of admission of aliens to the United States. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27 (1952). See generally *Elkins* v. *Moreno*, 435 U.S. 647, 664-665 (1978). Among other requirements, it conditions entry of aliens on compliance with limitations related to employment in the United States, thus reflecting Congress's consistent policy to

> provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

H.R. Rep. No. 1365, *supra*, at 51.

To implement this policy, the Act conditions entry of each immigrant alien who intends to work in the United States—with the exception of close relatives of U.S. citizens and lawful permanent resident aliens [1]—on the

[1] Section 1182(a)(14) states that it "shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title." The immigrant aliens to whom this sentence refers include all immigrants who may be allotted visas under the numerical limitations, except the relatives of citizens or

> the Attorney General the existing bond shall be surrendered and a new bond in greater or lesser amount or other conditions shall be furnished. *The bill intends that the Attorney General shall have untrammeled discretion to impose such conditions or terms as he sees fit in releasing an alien under bond * * * pending final determination of the deportability of the alien * * *.*[2]

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949) (emphasis added); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added).

Despite the failure of H.R. 10 to pass, it was, as this Court recognized in *Carlson* v. *Landon*, 342 U.S. at 538, the progenitor of Section 23 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1011. Section 23 specifically amended former 8 U.S.C. 156 to contain the exact language that H.R. 10 would have enacted. In 1952, when Congress comprehensively revised the immigration laws, (ch. 477, 66 Stat. 163), former 8 U.S.C. 156 was replaced by Section 242(a) of the new Act, now codified at 8 U.S.C. 1252(a)(1). That Section provides that an alien may be released on bond "with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe." The language specifying that "[i]t shall be among the conditions" that the alien appear was not carried into the statute, but the legislative history indicates that Section 1252(a)(1), "in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950." H.R. Rep. No. 1365, *supra*, at 57.[3]

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[2] The House report also stated more generally that one purpose of the bill was to "return without doubt to the political (executive) branch of the Government certain functions in connection with the exclusion and expulsion of aliens which historically have been vested in that branch, rather than the judiciary." H.R. Rep. No. 1192, *supra*, at 4.

[3] The Subversive Activities Control Act of 1950 is Title I of the Internal Security Act of 1950, and references to Section 23 of either Act are to the same provision.

2. The Immigration and Naturalization Service (INS) has been delegated authority to act on behalf of the Attorney General in matters relevant to this case. See 8 C.F.R. 2.1. Before INS promulgated the regulation challenged in this action, district directors had to obtain prior approval from INS regional commissioners in order to impose a condition in an alien's release bond that the alien refrain from unauthorized employment pending completion of the deportation proceeding. 8 C.F.R. 103.6 (a)(2)(ii) (1983). In March 1983, INS proposed to simplify that cumbersome procedure by including a condition prohibiting unauthorized employment in every "appearance and delivery bond in connection with a deportation proceeding or bond posted for release of an alien in exclusion proceedings, unless upon application by the alien the District Director determines that employment is appropriate" in light of certain specified factors.[4] 48 Fed. Reg. 8820-8821 (1983). INS explained that the re-

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[4] The regulation set forth factors to be considered in the exercise of discretion concerning whether to grant work authorization, including the safeguarding of employment opportunities for American citizens, prior violations of the immigration laws by the alien, whether an American citizen or lawful permanent resident is dependent on the alien for support, and whether there are other equities that should be considered. See 48 Fed. Reg. 51,144 (1983) (8 C.F.R. 103.6(a)(2)(iii) and 109.1(b)(8)); App. 123a, 148a. The authority proposed to be given to district directors under these regulations would be in addition to the district directors' preexisting authority, 8 C.F.R. 109.1(b)(1)-(7) (1983), to grant work authorization to aliens who are in certain specified statuses or have applied for or been granted certain specified benefits.

During the pendency of this litigation, various regulations regarding alien work authorization—including 8 C.F.R. 109.1 (1984)—were amended and recodified at 8 C.F.R. 274a.12; App. 127a-136a. Subsections (a) and (b) of this new section set forth a listing of the numerous immigration statuses that automatically convey work authorization. Subsection (c) sets forth numerous provisions, such as the one at issue here, under which aliens may apply for work authorization. The specific provision regarding temporary work authorizations for aliens pending deportation proceedings (former 8 C.F.R. 109.1(b)(8) (1984)) now appears, with some elaboration as to the factors to be considered in granting such relief, as 8 C.F.R. 274a.12(c)(13). App. 135a-136a.

visions were "consistent with the general principle that employment of aliens in the United States is to be strictly controlled to safeguard the interest of U.S. citizens and permanent resident aliens." 48 Fed. Reg. 8820 (1983).

In November 1983, INS published a revised, final regulation. An accompanying explanation addressed the concerns raised in the public comments that had not been addressed by revisions to the regulation. 48 Fed. Reg. 51,142-51,144 (1983); App. 137a-149a. Responding to the most significant misapprehension expressed, INS explained that the regulation would not diminish any employment authorization that an alien already had because it barred only "working without authorization"—*i.e.*, "unauthorized work [that] is a continuing violation of the immigration laws." 48 Fed. Reg. 51,142 (1983); App. 139a. The regulation would not affect citizens or permanent resident aliens (who have authorization to work by virtue of their status). 48 Fed. Reg. 51,143 (1983); App. 142a-143a. Nor would the regulation affect asylum applicants who file nonfrivolous applications, since another regulation, 8 C.F.R. Pt. 208; see also 8 C.F.R. 274a.12(c)(8), governs employment authorization for such aliens. 48 Fed. Reg. 51,143 (1983); App. 143a. The primary effect of the regulation, the INS explained, is to place on the alien who wishes to avoid a no-unauthorized-work rider on his release bond the burden of seeking employment authorization from the district director. 48 Fed. Reg. 51,143 (1983); App. 141a. By placing that burden on the alien, INS intended to remove an economic incentive for illegal entry, and also to remove an incentive to delay deportation proceedings when an alien is apprehended. Acknowledging that fewer bonds might be written and that more aliens might be detained in custody under the new regulation, INS stated that these were acceptable costs in the effort to safeguard employment for U.S. citizens and permanent resident aliens. 48 Fed. Reg. 51,143 (1983); App. 141a.

3. On December 6, 1983, one day before the new regulation was to take effect, respondents filed this action challenging its validity on a variety of statutory and constitutional theories.[5] Ten days later, the district court issued a nationwide preliminary injunction prohibiting implementation of the regulation. App. 109a-118a. The basis for this ruling was that respondents had a "fair chance" of success on their arguments that 8 U.S.C. 1252(a) does not authorize a condition on release bonds that is unrelated to ensuring the alien's appearance and that the regulation deprives aliens of their due process rights by denying them the right to work until deportability is finally determined. App. 115a. On appeal, the court of appeals affirmed in part and reversed in part. *Id.* at 96a-108a. The court held that a nationwide injunction was improper in the absence of class certification, but agreed with the district court that the respondents had a "fair chance" of succeeding on the merits of their statutory argument and affirmed the injunction. *Id.* at 107a. The court remanded for further proceedings on the question of class certification, as well as on respondents' request for permanent relief. *Id.* at 107a-108a.

On remand, the district court certified a nationwide class and entered a nationwide permanent injunction. App. 81a-95a. The sole ground for the district court's ruling was that the regulation exceeded the statutory authority granted in 8 U.S.C. 1252(a). App. 84a, 95a. Although the court acknowledged that the condition prohibiting unauthorized employment does "further the broad purposes of the Immigration and Nationality Act," App. 85a, and acknowledged that the plain language of

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[5] Plaintiffs named in the original complaint were 13 nonprofit organizations providing free legal services to aliens with immigration problems, a local United Auto Workers Union affiliate, six named aliens held in detention, and one unnamed alien who claimed to be deterred from filing for benefits by fear that the new regulation would result in indefinite detention. Clerk's Record, Docket Entry 1, at 5-9. In an amended complaint, filed on December 16, 1983, one of the alien plaintiffs held in detention was dropped and ten alien plaintiffs were added. E.R. 8-17. Four of the additional plaintiffs alleged that a "no-work" condition had been included in their release bonds; six alleged that they were then in detention.

the statute "appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond," *id.* at 87a, it nevertheless held that bond conditions must be limited to ensuring the alien's appearance at deportation proceedings, *id.* at 88a-89a, 92a. Quoting the earlier court of appeals opinion, the district court relied on this Court's opinion in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 892-893 (1984), to characterize unauthorized employment by aliens as only a "peripheral concern" of the immigration laws. App. 92a. The court further faulted the regulation for "inherently preclud[ing] any individualized determination," *id.* at 85a, and held that "the discretion of the Attorney General does not extend to the blanket imposition of a no work condition on all aliens who are released on bond," *id.* at 95a.[6]

The court of appeals affirmed. App. 71a-80a. Like the district court, the court of appeals acknowledged the breadth of the statutory language, but held that "legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings." *Id.* at 77a. The court reiterated the view, expressed in its earlier opinion, that the INA is not primarily concerned with employment of aliens and that such a purpose would not support the no-unauthorized-work condition on release. App. 79a-80a. The court of appeals also endorsed the district court's reasoning that the Attorney General must

[6] The scope of the district court's injunction, which remains in effect, is not entirely clear. For example, it is not clear whether the district court intended to bar implementation of 8 C.F.R. 103.6(a)(2) only, or also enjoined implementation of simultaneously proposed changes, beneficial to aliens, in 8 C.F.R. 109.1 (1984) (now recodified at 8 C.F.R. 274a.12(c)(13)). It is also unclear whether the district court intended to prohibit continued use of the prior version of the regulation, which permitted no-unauthorized-employment conditions on a case-by-case basis. Subsequent rulings, including the court of appeals' most recent opinion, have done nothing to alleviate these uncertainties.

proceed by "individualized determinations rather than the imposition of a blanket condition." *Id.* at 80a.

Because this ruling seriously restricted the Attorney General's discretion to impose conditions in bonds issued to effect the release of aliens pending deportation proceedings, and because the nationwide character of the injunction precluded further litigation in other circuits, the Solicitor General petitioned this Court for a writ of certiorari. Meanwhile, subsequent to the entry of the court of appeals decision, Congress had enacted IRCA. Respondents relied on the passage of IRCA to oppose the petition, arguing that it would make review of the regulation "academic."[7] This Court issued an order granting the writ, vacating the judgment of the court of appeals, and remanding the case "for further consideration in light of the Immigration Reform and Control Act of 1986." 481 U.S. 1009, 1009-1010 (1987).

The court of appeals then remanded the case to the district court, and that court issued an order reaffirming its grant of summary judgment and declining to revise its assessment of the legal issues in light of IRCA. App. 66a-70a. The court acknowledged that IRCA makes the question at hand "a more difficult one," App. 70a, but adhered to its earlier view that the legislative history of 8 U.S.C. 1252(a)(1) limits permissible release conditions to those "aimed at obtaining an undocumented worker's appearance at future immigration proceedings," App. 68a. The court also reiterated its criticism that the regulation was a "blanket no-work provision that is devoid of individualized determinations as to employment status." *Id.* at 69a.

On appeal, a divided panel of the court of appeals affirmed the district court. App. 1a-60a.[8] In light of an

[7] See Opposition to Petition for a Writ of Certiorari at 10, in No. 86-1207 (filed Mar. 31, 1987).

[8] Prior to issuing its ruling on the merits of this appeal, the court of appeals published an opinion rejecting respondents' suggestion that it lacked appellate jurisdiction because the govern-

intervening ruling by another panel of the same court,[9] the majority was constrained to recognize that bond conditions are not limited to "the *sole* purpose of ensuring appearance at deportation hearings." *Id.* at 22a-23a. By a somewhat modified and lengthier route, however, the court of appeals arrived at essentially the same result as it had prior to this Court's remand. After distinguishing the precedent noted above, the panel majority used a two-step process to arrive at the conclusion that employment considerations cannot justify bond conditions under 8 U.S.C. 1252(a)(1). First, after reviewing earlier INS practice and the policies of IRCA, the majority concluded that the Attorney General cannot use detention to combat problems of unlawful employment. App. 47a; see also *id.* at 35a (Attorney General has "no authority for *detention* in relation to unauthorized employment"). Second, the majority held that "where there is no power to detain, conditions must be related to ensuring the alien's appearance." *Id.* at 54a.

The court of appeals' opinion also relies heavily on the conclusion that bond conditions must be based on individualized administrative proceedings rather than on application of a general rule. The majority discussed at length prior cases dealing with the need for such individualized determinations in cases of aliens detained as security risks, App. 25a-33a, and concluded that bond conditions "must be based on specific facts regarding the individual" in question. *Id.* at 57a. It accordingly ruled that the "blanket condition" represented by the rule at issue would not pass muster, in its view, "even if unauthorized employment were ground for detention." *Id.* at 57a-58a.

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ment's notice of appeal did not list the respondents by name. App. 61a-65a.

[9] See *Flores* v. *Meese*, 906 F.2d 396, amended, 913 F.2d 1315 (9th Cir. 1990), withdrawn on grant of reh'g en banc, No. 88-6249 (Nov. 19, 1990).

Judge Trott dissented. App. 58a-60a. Viewing the proper analysis as "uncomplicated," he found that the bond conditions INS seeks to impose by rule are rationally related to "[a]n unmistakable purpose of the [INA]"—*i.e.*, " 'to preserve jobs for American workers.' " *Id.* at 58a (quoting *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. at 893). He also reasoned that this purpose was "fortified" by IRCA, and characterized the majority's attempt to find support for its position in IRCA as "thoroughly unpersuasive." App. 59a. Because the regulations at issue would further the goal of preventing continued illegal employment by aliens awaiting deportation proceedings, Judge Trott concluded that "the majority opinion improperly invades the province of the Attorney General." *Ibid.*

REASONS FOR GRANTING THE PETITION

Little has changed since this Court granted certiorari and remanded the case four years ago. The court of appeals has again affirmed a ruling greatly restricting the Attorney General's statutory discretion in an important area of immigration law, and has done so on grounds having no basis in the statutory language. The nationwide character of the injunction, moreover, "foreclos[es] adjudication by a number of different courts and judges," *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979), and forces INS to seek this Court's review without the benefit of additional consideration in the lower courts.

The lower courts' erroneous assertion of subject matter jurisdiction provides an independent basis for review. The INA limits review of "any determination * * * concerning * * * release on bond" to individual habeas corpus proceedings. 8 U.S.C. 1252(a)(1). In rejecting the government's argument that this provision precludes the exercise of jurisdiction in this action, the court of appeals relied entirely on the reasoning of lower court decisions holding that federal question jurisdiction is

available in actions alleging a "pattern and practice" of misconduct by the INS. Since the force of those cases may be undermined by this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332 (argued Oct. 29, 1990), the Court should hold this petition for disposition in light of the decision in that case.

1. The jurisdiction of the lower federal courts is controlled by statute. *Finley* v. *United States*, 109 S. Ct. 2003, 2006 (1989); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another."). The statute governing judicial review of challenges to bond conditions, 8 U.S.C. 1252(a)(1) (emphasis added), provides:

> Any court of competent jurisdiction shall have authority to review or revise *any determination* of the Attorney General *concerning* detention, *release on bond*, or parole pending final decision of deportability upon a conclusive showing *in habeas corpus proceedings* that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

By its terms, Section 1252(a)(1) limits review or revision of "any determination" of the Attorney General "concerning * * * release on bond" to individual "habeas corpus proceedings," and authorizes relief in such proceedings only on a showing that the Attorney General is not proceeding with "reasonable dispatch" in determining the alien's deportability. The legislative history emphasizes that individual habeas corpus proceedings are the exclusive means of review:

> An alien arrested and taken into custody may, pending the final determination of deportability, be continued in custody, released on bond or released on conditional parole, and the determination of the Attorney General concerning such detention, release on bond or parole shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch to determine deportability.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57 (1952) (emphasis added).

The court of appeals recognized that "[s]ince this suit was not brought as a habeas corpus action pursuant to section 1252(a)," App. 100a-101a, jurisdiction was not authorized by that Section. Rather than order dismissal of the action for lack of subject matter jurisdiction, however, it invoked federal question jurisdiction under 28 U.S.C. 1331 and 8 U.S.C. 1329. App. 101a. To justify this conclusion, the court of appeals relied on decisions of other courts of appeals purporting to create a "pattern and practice" exception to the provision governing administrative review of immigration determinations, 8 U.S.C. 1105a. App. 5a, 101a.

In *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332 (argued Oct. 29, 1990), we stated that "those cases, in our view, are wrongly decided." U.S. Br. at 26 in No. 89-1332. The two leading cases—both cited by the court of appeals below, see App. 5a—are *Haitian Refugee Center (HRC)* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985).[10] While the Fifth Circuit asserted in *HRC* that district courts may draw upon their "equitable

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[10] This Court ultimately affirmed the judgment in *Jean* v. *Nelson* without discussing the jurisdictional issue. The question presented by the petition in *Jean* was whether unadmitted aliens could invoke the equal protection guarantee of the Fifth Amendment's Due Process Clause. The Court, in affirming, did not reach that question because it held that nonconstitutional grounds for decision should be considered further on remand. *Jean* v. *Nelson*, 472 U.S. at 853-857. Since neither the parties nor the Court addressed the jurisdictional issue, the decision cannot be understood to constitute endorsement of the theory espoused by the lower court. See *Hagans* v. *Levine*, 415 U.S. 528, 535 n.5 (1974); cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-1065 (1990).

powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged," 676 F.2d at 1033, and the Eleventh Circuit in *Jean* extended that principle to statutory claims, 727 F.2d at 980 n.32, this Court has stressed that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law," *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988). *HRC* and *Jean* advanced various policy reasons for circumventing the scheme for judicial review set forth in 8 U.S.C. 1105a, but "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 311 (1989). The "pattern and practice" exception is particularly unmanageable because it contains no clearly delineated boundaries. "Although the Fifth Circuit emphasized the narrowness of its holding and promised not to condone any 'end-run around the administrative process,' the application of *HRC* v. *Smith* has proliferated to the point where it now more nearly resembles a gaping hole in the middle of INS's defensive line." *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1336 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018 (filed Dec. 27, 1989). The present case illustrates the lack of any limiting principle; unable to find in the governing statute any jurisdictional basis for respondents' challenge, the court of appeals simply extended the "pattern and practice" exception to bond determinations and proceeded to the merits.

We challenge the reasoning of the Fifth Circuit in *HRC* v. *Smith* and the Eleventh Circuit in *Jean* v. *Nelson*, and defend the contrary analysis of the D.C. Circuit in *Ayuda* v. *Thornburgh*, in our submission to this Court in *McNary* v. *Haitian Refugee Center*, No. 89-1332.[11] The court of appeals here relied entirely on the "pattern and

[11] We also argue in that submission that, in any event, the particular statutory provision at issue in *McNary* v. *Haitian Refugee Center* (8 U.S.C. 1160(e)) precludes the "pattern or practice" action in that case.

practice" line of cases in concluding that "[t]he district court had jurisdiction since NCIR challenged the blanket provision on constitutional and statutory grounds and did not seek a review on the merits of any individual determination regarding release on bond." App. 5a. Because this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332, may affect the subject matter jurisdiction of the district court, the Court should hold the petition for disposition in light of that decision.

2. Even if the district court had subject matter jurisdiction over respondents' nationwide class action, the courts below erred in holding that the Attorney General could not protect American laborers by imposing, as a condition of release on bond, a prohibition on unauthorized employment.

a. "One of the main reasons [aliens] come [to the United States illegally]—perhaps the main reason—is to seek employment." *INS* v. *Delgado*, 466 U.S. 210, 223 (1984) (Powell, J., concurring). This Court has recognized that "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. at 893. In its effort to implement the alien employment restrictions in the INA, INS continually seeks reasonable and efficient enforcement mechanisms that will discourage illegal immigration by removing the economic incentive for aliens to enter or remain in this country without proper authorization. As Justice Powell has observed, the government interest in such mechanisms can be "enormous." *Delgado*, 466 U.S. at 223 (Powell, J., concurring).

In a variety of contexts related to the enforcement of alien employment restrictions, the Court has recognized the importance to the government of similar enforcement techniques. For example, in *INS* v. *Delgado*, the Court rejected a Fourth Amendment challenge to INS's factory surveys when the surveys were conducted pursuant to warrants based on probable cause to believe that illegal aliens were employed on the premises. And in *Sure-Tan, Inc.* v. *NLRB*, the Court sustained the applicability of

the National Labor Relations Act's protection against unfair employment practices to undocumented alien employees. The Court reasoned that

> [a]pplication of the NLRA helps to assure that wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

467 U.S. at 893-894.

The effect of the challenged regulation is similar to the effect of conducting factory surveys or of applying the NLRA to undocumented alien workers. The regulation is designed to discourage entry for the purpose of engaging in unauthorized employment and to discourage aliens who are apprehended (on probable cause of unlawful presence in this country) from delaying determinations of deportability. Without the imposition of such a release condition, the alien has a strong incentive to prolong deportation proceedings and delay a final determination while he continues to work.[12]

It is a sound use of its limited resources for INS to impose a general condition on release that, in effect, commands aliens not to violate the law by working without authorization. That is what the present regulation ac-

[12] This Court has recently had occasion to comment that "[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation as long as possible." *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). The denial to INS of a mechanism to enforce the Act's prohibition on employment obviously enhances that incentive.

complishes: it provides that an alien who is apprehended on probable cause to believe that he is unlawfully in this country, and who is released on bond while awaiting a determination of deportability, must refrain from engaging in unauthorized employment.

Contrary to the court of appeals' supposition, App. 7a-13a, INS has consistently maintained that the regulation does not ban *all* employment—only employment that is "unauthorized."[13] For example, while permanent resident aliens may become subject to deportation proceedings for various reasons, employment of those persons is authorized by law, and their employment remains "authorized" until such time as they lose their permanent resident status.[14] See 48 Fed. Reg. 51,143 (1983); App. 142a-143a. In practice, the regulation would simply shift to an apprehended alien the burden of demonstrating that he has received authorization to engage in employment. Such a requirement will impose no burden on authorized employment in the vast majority of cases. If an alien is entitled to work by virtue of his status or individual authorization by a district director, proof of that fact should be readily available,[15] and the condition will not

[13] To the extent that there is any ambiguity in the regulation in this respect, the court of appeals' refusal to accept INS's reading of it was altogether improper—and especially so in light of the fact that the regulation was held to be invalid on its face before INS had an opportunity to implement it. See generally *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (courts must defer to agency's construction of its own regulations). This case, however, goes well beyond the court of appeals' misreading of the regulation. Regardless of how the regulation is interpreted, the court of appeals' restrictive reading of the statute interferes improperly with the Attorney General's discretion and warrants this Court's attention.

[14] Other statuses that automatically confer employment authorization are set forth at 8 C.F.R. 274a.12(a) and (b). App. 127a-132a.

[15] For example, lawful permanent resident aliens are issued "green cards," which they are required to carry with them at all times as evidence of their status. See 8 U.S.C. 1304(e); 8 C.F.R. 211.1(b); *Saxbe* v. *Bustos*, 419 U.S. 65, 68 (1974). Other aliens holding a status authorizing them to work, see 8 C.F.R. 274a.12(a)

apply. Thus, the challenged regulation does not eliminate any right to work that an alien may already have. Indeed, the regulation at issue includes a new, individualized opportunity for an apprehended alien to apply to a district director for employment authorization pending deportation proceedings. See 8 C.F.R. 274a.12(c)(13) (formerly 8 C.F.R. 109.1(b)(8) (1984)).

In short, the regulation is fully consistent with the objectives of the INA and with decisions of this Court upholding other efforts to further those objectives. Used in tandem with enforcement techniques the Court has already sanctioned, and with the employer sanction provisions of IRCA, this regulation significantly enhances INS's enforcement efforts and furthers the goal of discouraging illegal immigration.

b. The court below erred in holding that the regulation exceeds the Attorney General's statutory authority.

i. Two statutory provisions—one specific, one general—support the Attorney General's authority to issue

(listing statuses conferring general work authorization), will have that status "evidenced by an employment authorization document issued by the [INS]." Aliens in a status entitling them to limited work authorization, 8 C.F.R. 274a.12(b), will generally have that status reflected in a visa, 8 C.F.R. 212.1, or border crossing card, 8 C.F.R. 212.1(c). Moreover, each alien's evidence of registration has an "A" number, which can be given to INS to ascertain the alien's status. Thus, an alien who is permitted to work under the Act should have no difficulty demonstrating that fact to INS officials responsible for releasing the alien on bond.

Admittedly, there will be rare cases where unusual circumstances make it difficult to ascertain status. See, *e.g.*, *Liacakos* v. *Kennedy*, 195 F. Supp. 630 (D.D.C. 1961) (factual dispute regarding place of birth, where no birth certificate could be found). While we do not believe that the validity of the regulation is affected by its application in such cases, this is one reason why we do not share the view of the dissent below that the present controversy could be resolved by clarification of the regulation. See App. 59a-60a. Furthermore, we see no indication that the court of appeals majority would be "willing to go along with" a regulation so clarified, *id.* at 60a, in light of its conclusions that unauthorized employment cannot justify detention and that all bond conditions must be imposed pursuant to individualized determinations. *Id.* at 57a-58a.

the regulation challenged in this case. The first provision, 8 U.S.C. 1252(a)(1), is specifically concerned with the apprehension and detention of aliens pending deportation proceedings. It provides:

> Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2) [regarding mandatory detention of aliens convicted of aggravated felonies], any such alien taken into custody may, *in the discretion of the Attorney General* and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, *containing such conditions as the Attorney General may prescribe*; or (C) be released on conditional parole. But such bond or parole, where heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability.

8 U.S.C. 1252(a)(1) (emphasis added).

The second provision, 8 U.S.C. 1103(a), confers on the Attorney General broad powers to administer and enforce the INA:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens * * *. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; *and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.* * * *

8 U.S.C. 1103(a).

The court of appeals made only a passing nod at the language of the statute before holding that it does not mean what it says. Despite acknowledging that the statute "'was meant to confer broad power upon the Attorney General to detain aliens prior to a final determination of deportability,'" and that the Attorney General has "'broad discretion in acting to fulfill the purposes of [the immigration] laws,'" App. 22a (quoting *Flores*, 913 F.2d at 1325), the court went on to rule that detention cannot be used in conjunction with efforts to combat unauthorized employment, and that the bond conditions called for by the regulation at hand are impermissible.

No language in the INA limits the Attorney General's discretionary detention and bond authority to uses concerning the alien's appearance at subsequent proceedings. By contrast, the provisions of the Criminal Code governing bonds in criminal cases specifically enumerate both the permissible conditions of release and the purpose to be served by those conditions. 18 U.S.C. 3142(c), (g), and (h).[16] In the very context of release on bond pending deportation proceedings, Congress at one time limited the allowable conditions to those designed to ensure appearance, 8 U.S.C. 156 (1940), but that statute has been repealed in favor of the present provision. Thus, the broad language of 8 U.S.C. 1252(a)(1) must mean that Congress intended the Attorney General to have wider authority to impose any conditions reasonably related to the broader purposes of the Act.

This conclusion is confirmed by the legislative history of 8 U.S.C. 1252(a)(1). As explained above, ch. 1024, § 23,

[16] Notably, Congress has determined that the bond of a person charged with a crime must condition release on the person's not committing any crime while on release. 18 U.S.C. 3142(c)(1). Although Congress has not made it mandatory that the bond of a person charged with an immigration violation condition release on the person's not committing further immigration violations, that is hardly a basis for concluding that the broad language of 8 U.S.C. 1252(a)(1) prohibits the Attorney General from imposing a limited, specific condition of this kind.

64 Stat. 1011, (the predecessor of 8 U.S.C. 1252(a)(1)), was originally proposed in H.R. 10, a bill that did not pass. The language of H.R. 10, however, was incorporated in Section 23, and the legislative history of that Section is contained in the reports accompanying H.R. 10. Those reports (quoted at pp. 5-6, *supra*) signal a clear congressional intent to give the Attorney General "full discretion" and "untrammeled authority" to impose conditions other than a condition that the alien appear for deportation proceedings. Indeed, Congress could not have been more explicit in stating its intent to grant the Attorney General broad power to impose bond conditions.[17]

ii. The court of appeals' reasons for ignoring the statute's clear language are altogether inadequate. In concluding that the Attorney General has "no authority for *detention* in relation to unauthorized employment," App. 35a, the court relied in large part on prior practice of the INS, which did not impose employment riders on bonds prior to the mid-1970s and then did so only on a case-by-case basis, *id.* at 33a-37a. This discussion, however, shows at most that the promulgation of the regulation at issue represented a new *policy* choice by INS regarding the way in which it would exercise its statutory authority. This Court has recognized that the very nature of administrative discretion requires that agencies be permitted to alter policies, within statutory bounds, to accommodate "changing needs." See *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967). The broad authority that the statute has

[17] The court of appeals in an earlier opinion relied on a listing of examples in the legislative history, as support for the proposition that only appearance-related conditions are permitted. App. 77a-78a. Although it is true that the examples contained in the legislative history relate to ensuring appearance, "the language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990).

always provided fully entitles the INS to determine, on reassessment of the vexing problem of unlawful employment, to make a shift in its policy on release conditions.[18]

The court of appeals also erred in its reliance on IRCA, App. 37a-48a, as limiting the Attorney General's discretion. While IRCA "fortifie[s]" the conclusion that the protection of American labor is at the heart of the purposes of the immigration laws, see *id.* at 59a (Trott, J., dissenting), it did not alter the broad grant of authority in 8 U.S.C. 1252(a)(1), and INS has not relied on it as a source of its authority to promulgate the regulation at issue. IRCA simply does not address the issue of release on bond, nor the conditions that may be attached to such release.

By the same token, Congress's rejection in 1986 of *additional* sanctions on unlawfully employed aliens cannot warrant a conclusion that it intended to restrict previously enacted authority.[19] While the court of appeals majority correctly noted that IRCA represents a "carefully crafted political compromise" to take new steps to

[18] The court of appeals was mistaken in citing the Attorney General's decision in *In re Toscano-Rivas*, 14 I. & N. Dec. 550 (A.G. 1974), solely for the proposition "that individualized determinations with structured review procedures were necessary" for the imposition of work conditions. App. 37a. The court ignored the significance of the Attorney General's affirmance in that opinion of his authority, under both 8 U.S.C. 1252(a)(1) and 8 U.S.C. 1103(a), to impose riders on release bonds prohibiting unauthorized employment. 14 I. & N. Dec. at 556.

[19] As noted by the court of appeals, App. 42a, the "employee sanctions" that Congress considered and rejected in the course of enacting IRCA would have entailed jail terms for unauthorized work. See *Immigration Reform and Control Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 44-45 (1985). Such punitive sanctions would be altogether different from detention under the present regulation—detention that is limited to the duration of deportation proceedings, that occurs only if the alien violates the bond condition, and that can always be avoided by a decision to accept voluntary departure.

fight the problem of employment by illegal aliens, App. 38a, IRCA was enacted against a backdrop of existing provisions that Congress did not alter. The regulation at issue does not conflict with any provision of IRCA, and there is no basis for the court of appeals' assertion that it is somehow "contrary to a congressional policy" choice. *Id.* at 47a.

c. As noted above, the court of appeals' most recent opinion relies more extensively on the notion, expressed by previous panels, that the regulation is improper because it represents a "blanket" imposition of a condition on release bonds that precludes "individualized determinations." See App. 26a-32a, 54a-58a. This notion, like the holding that detention cannot be used with respect to employment concerns, is without foundation in the statute.[20]

Contrary to the court of appeals' understanding, the regulation contemplates at least two types of individualized determinations. The first relates to INS's stated intent to apply the regulation, in accordance with the language of its heading, only to "unauthorized employment." As noted above, this would entail an initial, informal determination whether the alien could establish that he was authorized to work. See note 15, *supra*. Second, the regulation affords an opportunity for an arrested alien released on bond to obtain an individualized determination whether employment should be authorized. 8 C.F.R. 274a.12(c)(13); App. 135a-136a.

The court of appeals nevertheless concluded that the regulation, in imposing a "blanket condition," violated the statute. App. 17a-18a, 25a-33a. Nowhere, however,

[20] Although the court of appeals' ruling is not crystal clear, the "individualized determination" issue appears to be an alternative rationale for the court's holding. After elsewhere concluding that there is no authority for the use of detention in connection with employment concerns, App. 47a, 54a, the court also concluded that a "blanket" condition would be impermissible "even if unauthorized employment were grounds for detention," *id.* at 57a.

did the court even attempt to find in the language of the statute a basis for its requirement that the Attorney General's discretion regarding bond conditions "must be exercised upon facts shown about each detained individual." *Id.* at 28a. The promulgation of rules has long been recognized as consistent with a grant of statutory discretion and with an opportunity for a hearing. As Judge Friendly reasoned in *Fook Hong Mak* v. *United States*, 435 F.2d 728 (2d Cir. 1970):

> We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary powers, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering.

Id. at 730. In this case, the statute gives the Attorney General discretion to impose "such conditions as [he] may prescribe" on releases on bond. The statute is silent as to whether such conditions should be "prescribed" in individualized proceedings or "prescribed" by rule. Accordingly, under well-established principles, INS is free to narrow its discretion by rule. See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 297 (1974). There is simply no basis for a conclusion that the statute requires INS to address each and every issue regarding bond conditions in individualized proceedings or precludes the promulgation of rules governing those conditions.[21]

The court of appeals relied in this regard on lower court decisions involving denials of bail to individuals claimed to be subversive or otherwise to pose risks to

[21] The court of appeals' insistence that bond conditions can be imposed only in individualized proceedings, and cannot be established by a rule subject to waiver in individual cases, appears to be based at least in part on the notion that even a temporary "interruption in [the] capacity to work" is impermissible under the statute. App. 12a. There is simply no basis for such a conclusion.

the national security. App. 25a-33a; see *id.* at 49a-54a. But those cases are inapposite because they deal with a fundamentally different type of inquiry. Whether a particular individual is a security risk is an inquiry to which individualized hearings are well suited and perhaps essential. With respect to employment conditions, however, the nature of the inquiry is completely different. By deciding to impose bond conditions aimed at reducing unauthorized employment, INS was making a *policy decision* that, as a general matter, the continued illegal employment of aliens, even after they have been arrested on probable cause and are awaiting deportation proceedings, is a problem warranting invocation of the Attorney General's discretionary authority. This is an issue peculiarly well-suited to decision by rule. Under the court of appeals' analysis, INS would presumably be required, in individual evidentiary proceedings, to pass in each case on the likelihood that the illegal employment of a particular alien would have an adverse effect on employment opportunities. Such a burdensome and quixotic requirement finds no support in the language or history of 8 U.S.C. 1252(a)(1).

The error of the court of appeals' ruling is even more apparent in light of the fact, noted above, that the regulations *do* provide for individualized determinations, and thus at most establish a rebuttable presumption—*i.e.*, that employment pending deportation is not permitted unless the alien can make a showing of existing authorization to work, or of circumstances warranting temporary authorization. The use of such a presumption and the consequent requirement that the alien bear the burden of proving otherwise is consistent with a long line of administrative law decisions. See, *e.g.*, *Heckler* v. *Campbell*, 461 U.S. 458 (1983); *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).[22] The court of appeals offered no

[22] Cf. *American Hospital Ass'n* v. *NLRB*, 899 F.2d 651 (7th Cir. 1990), cert. granted, 111 S. Ct. 242 (1990) (No. 90-97).

reason why such an approach is improper under the INA, apart from its own *ipse dixit* that bond conditions *must* be based on individualized proceedings, unaffected by rule.

* * * * *

The court of appeals has fundamentally misconstrued the Immigration and Nationality Act. It has invalidated a reasonable and important enforcement mechanism that is completely consistent with the language and purposes of the INA, and has imposed a novel requirement that the Attorney General's discretionary authority regarding detention and bond conditions can only be exercised in individualized proceedings. Because INS is foreclosed from litigating this issue further before other courts, review in this Court is essential to correct these errors.

CONCLUSION

The petition for a writ of certiorari should be held for *McNary* v. *Haitian Refuge Center, Inc.*, No. 89-1332, and disposed of in light of the Court's decision in that case.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5774

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC.; AMERICAN FRIENDS SERVICE COMMITTEE; EL RESCATE ("THE RESCUE"); UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, LOCAL 645; CENTRAL AMERICAN REFUGEE CENTER (CARECEN); EL CONCILIO MANZO; WILLAMETTE VALLEY IMMIGRATION PROJECT, PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Sept. 19, 1989
Decided Sept. 7, 1990

Before: FERGUSON, REINHARDT and TROTT, Circuit Judges.

FERGUSON, Circuit Judge:

This appeal concerns regulations promulgated in 1983 by the Immigration and Naturalization Service (INS), which imposed a condition against employment in appearance and delivery bonds of aliens awaiting deportation hearings. This is the third appeal to this court regarding this matter. Our earlier opinions, 743 F.2d 1365 (9th Cir. 1984), 791 F.2d 1351 (9th Cir. 1986) were vacated and remanded for further consideration in light of the Immigration Reform and Control Act of 1986 (IRCA). 481 U.S. 1009 (1987). On remand, the district court reiterated its earlier holding that the regulations were not authorized by the statute, and further held that the Attorney General's power to impose the blanket bond condition had not been modified or increased by the Immigration Reform and Control Act of 1986. The Immigration and Naturalization Service appeals the district court's grant of summary judgment in favor of the National Center for Immigrants' Rights, Inc. and other plaintiffs. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1983, the INS promulgated regulations which stated in part: "[a] condition against employment shall be included in an appearance and delivery bond in connection with a deportation proceeding. . . ." 8 C.F.R. 103.6(a)(2)(ii) (1988). The previous regulations had provided that, in his discretion and with the prior approval of the INS Regional Commissioner, the District Director could include a condition barring "unauthorized employment" in individual appearance and delivery bonds based on consideration of many factors; a non-exclusive list of nine factors was included in the regulation. 8 C.F.R. § 103.6 (a)(2)(ii), (3)(iii) (1983).

One day before the regulations went into effect, an injunction was sought by the National Center for Immigrants Rights and a group of other nonprofit organizations, a local affiliate of the United Auto Workers Union, and individuals in deportation proceedings ("NCIR"). Ten days later, after hearing evidence and testimony, the district court granted a preliminary injunction against enforcement of the regulation. The INS appealed to this court, challenging the jurisdiction of the district court, the grant of the preliminary injunction, and the failure to certify a class. *National Center for Immigrants Rights v. I.N.S.*, 743 F.2d 1365 (9th Cir. 1984). We held that the district court had jurisdiction and affirmed the injunction, but we remanded for class certification. *Id.*

On remand, the district court certified a class of "all those persons who have been or may in the future be denied the right to work pursuant to 8 C.F.R. § 103.6." The INS moved for summary judgment, stating that no issue of material fact existed and that they were entitled to judgment as a matter of law. The district court granted summary judgment in favor of the NCIR, holding the regulations invalid because the discretion granted to the Attorney General under the Immigration and Naturalization [*sic*] Act must be limited to those conditions which are related to securing the alien's presence at future deportation hearings. *National Center for Immigrants' Rights v. I.N.S.*, 644 F.Supp. 5 (C.D. Cal. 1985). The Attorney General's discretion could not extend to the blanket imposition of a no-work condition on all aliens released on bond pending future deportation proceedings. *Id.* at 11.

The INS appealed, again challenging jurisdiction and arguing that the Attorney General had statutory

authority to impose any condition in a bond that he deemed necessary to carry out the provisions of the act. *National Center for Immigrants' Rights v. I.N.S.*, 791 F.2d 1351 (9th Cir. 1986). We again upheld jurisdiction, *id.* at 1353-54, and affirmed the summary judgment, *id.* at 1354-56. The INS sought certiorari. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA). 8 U.S.C. § 1324a et seq. The Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of IRCA. 481 U.S. 1009 (1987). We remanded to the district court for this consideration. 818 F.2d 869 (9th Cir. 1987).

The district court requested additional briefing from the parties on the effect of IRCA on the condition imposed by the regulation. The court found that, although IRCA was concerned with the impact of the employment of undocumented workers on the American workforce, IRCA had not conferred upon the Attorney General the authority to impose a blanket no-work rider on appearance and delivery bonds. Incorporating portions of the analysis from its earlier opinion, the court again granted summary judgment in favor of the plaintiffs. The INS timely appealed the district court's reaffirmance of summary judgment.

JURISDICTION

The INS again challenges the jurisdiction of the district court, reasserting its position that review is only available on habeas corpus under 8 U.S.C. § 1252 (a)(1).[1] As we held previously, § 1252(a)(1) deals

[1] The statutory provision states in part:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

8 U.S.C. § 1252(a)(1).

only with complaints about delays in determining deportability in individual cases. In *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (11th Cir. 1982), *disapproved on other grounds, Jean v. Nelson*, 727 F.2d 957, 976 n. 27 (11th Cir. 1984) (en banc), the court distinguished between jurisdiction to rule on the merits of an individual deportation order and jurisdiction to rule on a pattern and practice of constitutional violations. *See also Flores v. Meese*, 913 F.2d 1315, 1318-1319 (9th Cir. 1990); *Salehi v. District Director, I.N.S.*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Jean v. Nelson*, 727 F.2d at 979-981 (statutory as well as constitutional questions), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (expressing no view on jurisdictional issues); *cf. Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989) (no jurisdiction in district court for review of legalization decisions under IRCA). The district court had jurisdiction since NCIR challenged the blanket provision on constitutional and statutory grounds and did not seek a review on the merits of any individual determination regarding release on bond.[2]

[2] During this appeal, the NCIR also raised a "suggestion of lack of jurisdiction," relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), which we rejected, 892 F.2d 814 (9th Cir.1989). The notice of appeal gave sufficient notice that all of the defendants sought to appeal. 892 F.2d at 816-17.

STANDARD OF REVIEW

Our prior judgments in this case were vacated when the Supreme Court remanded for consideration in light of IRCA. The district court incorporated portions of its earlier order by reference, considered the impact of IRCA, and reaffirmed its grant of summary judgment. When summary judgment is granted to the nonmoving party, the question is whether the moving party had an opportunity to fully and fairly litigate the issues. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982). Here, the district court received evidence and heard testimony. The INS twice sought a decision on the merits of this issue, first in our initial review of the preliminary injunction, 743 F.2d at 1369, and then with its motion for summary judgment in the district court, 644 F.Supp at 6. On remand, when providing additional briefing on IRCA, the INS raised no suggestion that any additional litigation was needed. We review the grant of summary judgment de novo, *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

I. THE IMPACT OF THE REGULATION

The challenged regulation states that a "condition *barring employment shall be* included in an appearance and delivery bond in connection with a deportation proceeding. . . ." 8 C.F.R. § 103.6(a)(2)(ii) (1990) (emphasis added). During this litigation, basic questions concerning the nature, scope, and im-

pact of the regulation have been subject to debate: (a) whether the condition bars "employment" or only "unauthorized employment"; (b) whether it applies only to those who are unauthorized to work in any event; (c) whether it implicates only work or also freedom from detention; and (d) whether it is a "blanket condition" or affords individualized determinations which merely shift the burden of proof regarding work authorization. We examine each of these in turn before turning to our analysis of the statutory authority for the regulations.

A. "EMPLOYMENT" OR "UNAUTHORIZED EMPLOYMENT"

The INS asserts that the regulation only bars "unauthorized employment." The INS has used both terms—"employment" and "unauthorized employment"—at different times, though not quite interchangeably. In the text of the regulation and when put into operation on the face of the bonds, the condition refers broadly to "employment."

The text of the subsection describes a "condition *against employment*." 8 C.F.R. § 103.6(a)(2)(ii) (emphasis added). The caption appearing above this provision is more limited: "Condition against *unauthorized* employment" (emphasis added). The meaning lies in the text of the regulation. "[T]he heading of a section cannot limit the plain meaning of the text." *Railroad Trainmen v. B. & O.R. Co.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947) (statutory interpretation). *See also Nordby Supply Co. v. United States*, 572 F.2d 1377, 1378 (9th Cir.), *cert. denied*, 439 U.S. 861, 99 S.Ct. 182, 58 L.Ed.2d 170 (1978).

The discrepancy could be accidental, but a comparison with the previous regulation shows that the use of the term "employment" is deliberate. The previous regulation, which had the same caption, read: "In the discretion of the district director and with the prior approval of the regional commissioner, a condition barring *unauthorized* employment may be included in an appearance and delivery bond in connection with a deportation proceeding." 8 C.F.R. 103.6 (a)(2) (1983) (emphasis added). The change from the previous regulation demonstrates an intentional shift when the regulation was rewritten. Similarly, in the notice accompanying the final rule, the INS repeatedly referred to this condition as a "no-work rider." 48 Fed. Reg. 51142-43 (Nov. 7, 1983). When the condition itself was discussed, rather than the justification for its enactment, it was generally described as barring "employment" and only occasionally as barring "unauthorized employment." *Id.*[3]

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[3] The text refers fifteen times to a "no-work" rider or to a condition "barring employment" or "against employment." *Id.* at 51142-43. In contrast, the phrases "unauthorized work" or "working without authorization" appear five times: twice in describing the problem of unauthorized work by aliens in deportation proceedings (not the condition), once in relation to employment as the violation for which the alien is apprehended; once in a quotation, and once in describing the reasonableness of the bond condition. *Id.* at 51142. The bond condition is also described as barring "unauthorized employment" twice, including once in the same sentence which describes a "condition barring employment." *Id.* Some of these shifts in terminology arise because of an emphasis on the Attorney General's discretion to grant employment authorization under a regulation now codified at 8 C.F.R. § 274a.12 (c)(13), discussed *infra*.

Finally, the language of the bond condition itself explicitly bars employment.[4] The INS Operating Instruction issued pursuant to the regulation was stayed by the injunction in this case. OI 103.6(i), Court Record at 44, Exhibit A. The Operating Instruction states: "where a condition against unauthorized employment is effective, the order to show cause shall be stamped 'Bond-*Employment Not Authorized.*'" *Id.* (emphasis added). The text of the Operating Instruction refers to this condition as "prohibiting unauthorized employment." *Id.* But it is the bond condition itself which will be seen and relied upon by the individuals to whom it is applied, employers, and the authorities who decide whether the condition has been violated—and this condition bars "employment."

The language of the bond condition, however, cannot be isolated from the context in which it is applied. This is the *same* language which appeared in the prior Operating Instruction, written under the previous regulation specifying "unauthorized employment," in which the determination as to its imposition on bonds was made in individual cases by the District Director with the approval of the Regional Director. OI 103.6i "Appearance and Delivery Bond", *reprinted in* Gordon & Mailman, Immigra-

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[4] In response to questions at oral argument regarding the exact language to be used in the bond condition, both sides submitted uncertified copies of documents. One document was irrelevant since it was drafted under the prior regulation. We decline to take judicial notice of these documents. The language of the instruction is part of the record in this case, since it appears in a certified copy of the INS Operating Instruction which was the sole exhibit in the Motion for Summary Judgment made by the INS. Court Record at 44, Exhibit A.

tion Law and Procedure, Rev.Ed., 2 Appendix, Operations Instructions, at 23-65. Therefore the question of whether this condition bars "employment" or merely "unauthorized employment" is not separate from the determination of the individuals to whose bonds it will be applied.

B. INDIVIDUALS SUBJECT TO THE BOND CONDITION

Individuals are arrested by the INS upon a "prima facie" showing of deportability, *Abel v. United States*, 362 U.S. 217, 232, 80 S.Ct. 683, 693, 4 L.Ed.2d 668 (1960), or of probable cause, *see Int'l Molders & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 552 (9th Cir. 1986). Most take voluntary departure, *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044, 104 S.Ct. 3479, 3486, 82 L.Ed.2d 778 (1984) (97.5% of illegal aliens arrested by the INS agree to voluntary departure without a hearing); some are released on parole, *see* 8 U.S.C. § 1252(a)(1).

For all those released on bond while awaiting determinations of deportability, the regulation imposes a "condition against employment" on *all* appearance and delivery bonds; it is not limited by status, work authorization, or the reasons deportation is sought. In the final notice promulgating the rule, the only limitation asserted was that the INS would not apply the rule to permanent resident aliens.[5] 48 Fed.Reg.

[5] The final notice states that the work authorization of those who have filed a non-frivolous application for asylum is governed by a different regulatory section (now consolidated at 8 C.F.R. 274a.12(c)), but it does not state that the provision barring employment will not be applied to bonds for these aliens. 48 Fed.Reg. 51143.

51143. The INS Operating Instruction states: "Individuals maintaining a colorable claim to U.S. Citizenship and permanent resident aliens . . . shall not be subject to this general prohibition until such time as a final administrative determination of deportability has been made," OI 103.6(i), Court Record at 44, Exhibit A. The language of the Operating Instruction implicitly claims the capacity to apply the bond condition to all and therefore supports a literal reading of the regulation. Even if the condition is not applied to permanent residents or to those with a "colorable claim of citizenship,"[6] all other appearance and delivery bonds are included in the mandatory language of the regulation.

If these exceptions were observed, the condition would still be imposed on all other appearance and delivery bonds. 8 C.F.R. § 274a.12 lists the categories in which individuals may be authorized to work. Besides permanent residents, there are ten other categories of aliens who are authorized to work

[6] The instruction provides no procedures for discovering or distinguishing a "colorable" claim. In *Agosto v. I.N.S.*, 436 U.S. 748, 755 n. 5, 98 S.Ct. 2081, 2086 n. 5, 56 L.Ed.2d 677 (1978), the Supreme Court noted the uncertainties accompanying this term. The laws governing the acquisition and retention of citizenship are extremely complex. *See generally* Gordon and Mailman, *Immigration Law and Procedure*, Sections 13.3-13.9A. (Noting "frustrating difficulties often presented by such assessments," *id.* at 13-39; "[C]onstant changes in the prescribed conditions have transformed a relatively simple inquiry into one which often is exceedingly and unnecessarily complex," *id.* at 13-38 to 13-39.) Because of this complexity, some people may not know they are citizens unless they receive legal advice. The INS has pointed to no procedure to help detect such individuals. Absent such inquiry, this may really be protection only for individuals who already know they have a "colorable claim of citizenship."

incident to their status and need no authorization from the INS. These include aliens granted asylum, non-immigrant fiances, or parents and dependent children of permanent residents, among others. Section 274a.12(b) lists sixteen categories of aliens authorized for employment with a specific employer incident to status, who also need not seek work authorization from the INS. These include temporary workers, nonimmigrant students employed less than 20 hours per week when school is in session, and treaty traders, among others.

Finally, § 274a.12(c) lists fifteen categories of aliens whose authorization for work is granted by the INS, including nonimmigrant students seeking off-campus employment, applicants for asylum or suspension of deportation—as well as aliens in deportation or exclusion proceedings who would be subject to the condition against employment but could apply for work authorization through the District Director. For those in § 274a.12(c), employment authorization automatically terminates upon the initiation of deportation or exclusion proceedings. § 274a.14(a)(1)(ii). They may then reapply for work authorization *if they are not in detention* under § 274a.12(c)(13). Approval is discretionary except for aliens who apply for asylum. § 274a.13(a). The INS has up to 60 days to make its decision. § 274a.13(d).

On appeal, the INS asserts that anyone who has work authorization can easily establish this fact. The plain language of the regulation and the agency's interpretation of it in the final notice and operating instruction show that these individuals are not protected from some interruption in their capacity to work, even if matters can be corrected later. The challenged regulation and the agency's interpretation

of it show the bond condition would apply to all those who post bond while awaiting deportation proceedings, including aliens who have never had work authorization or legal status and those described above who have many different types of authorization and status, with the possible exception of permanent residents and individuals whose claims of citizenship appear "colorable" to the INS.

On appeal, the INS says that it will not apply the provision to anyone who has work authorization. But the mandatory and sweeping language of the bond rider does not distinguish aliens of different status. Justice Douglas, sitting as Circuit Justice for the Ninth Circuit, once addressed a similar argument regarding a bond condition barring association with any Communist: "On oral argument the Department of Justice says that the language would not, as a matter of administrative practice, be construed that way. But there is a broad sweep to the language that would permit another ruling on a different day." *Yanish v. Barber*, 73 S.Ct. 1105, 1108, 97 L.Ed. 1637 (1953) (Douglas, J., in chambers).

C. DETENTION AND WORK

Also at issue is the interest at stake in this regulation: is it merely a prohibition against work, or an expanded exercise of detention? The INS claims absolute power to detain if there are grounds for arrest as a deportable alien; any release at all is "a matter of grace." This argument assumes what it must prove: work becomes the sole issue *only* if the authority to detain is unlimited. Detention cannot be effectively distinguished from a work-related condition on release, since both the regulation and the notice which promulgated it explicitly show that the

bond condition links detention with refraining from work. Since "[a] condition barring employment *shall be imposed*" on bonds, 8 C.F.R. § 103.6(a)(2)(ii) (emphasis added), those who do not accept the condition are subject to continued detention.

In addition, when the INS promulgated the final rule on this regulation in the Federal Register, it specifically distinguished the "no-work" condition from a money bond. 48 Fed.Reg. 51142. The purpose of a money bond is to insure the alien's appearance. The violation of a condition barring employment would not lead to forfeiture of the money. "Where the 'no work' condition is violated, the appropriate response would be to take the alien into custody. . . . Rather [than being tied to the money bond], 'no work' is a condition of release which, if violated, gives the Service the right to order the alien to surrender and appear." *Id.* If the alien failed to appear, the bond would then be declared in default. *Id.* This discussion, offered to reassure commenters who feared the money bond would be subject to forfeit merely for the act of working, explicitly demonstrates that detention will be the result if the alien works. It further clarifies this connection by separating these issues from the link between the money bond and the appearance of the alien. During appeal as well, even while attempting to distinguish detention from a bond condition regarding employment, the INS has repeatedly stated that the alien would be detained if the condition were violated.

While the INS has attempted throughout the course of this litigation to characterize the regulation as a bond condition with respect to employment, in practice it recognizes that if the regulation were implemented, the result would be an increase in the

number of aliens detained. The INS has stated that "[t]he possibility that a bonding company might require more collateral or charge higher premiums was also considered. As a corollary of these possibilities, it was also assumed that more aliens might have to be detained. This latter possibility was considered an acceptable consequence." 48 Fed.Reg. 51143 (1983). The plaintiffs, in their Exhibits and Supplemental Exhibits, contended that bonding companies may, in response to the imposition of the no-work condition on the bond, refuse to underwrite immigration bonds entirely or charge significantly higher premiums which most aliens will not be able to afford. The INS did not contest these claims. Rather, it agreed that bonding companies may change the manner in which they conduct business, resulting in an increase in the number of those detained: "Plaintiffs might be correct in speculating that the new regulations will make it more difficult for many persons to bond out of detention." Thus, the proposed regulation, while facially concerned with employment, will in fact result in the detention of a significant number of aliens.[7]

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[7] The plaintiffs, in their Exhibits and Supplemental Exhibits, outline the dimensions of the problem. It is unclear whether bonding companies will underwrite bonds with a no-work condition stipulated on the face of the bond. The declarations of bondsmen working in this field suggest that the answer is "no," and the INS has not contested the assertions made to this effect in many of the plaintiffs' declarations. Generally, aliens in deportation proceedings lack the financial resources to enable them to post any significant portion of their bond. The frequently borrow funds from relatives or friends, and with these amounts, contract with a bonding company to put up the full bond with the INS; their relatives or friends then serve as guarantors. Raul Atler, a bondsman at a Los Angeles bond company which bails out persons

Although people subject to this condition are differently situated with regard to work, they are simi-

undergoing deportation proceedings, declared under penalty of perjury that in his discussion with other immigration bond people, "most state that they will not place bonds with INS in deportation cases if the client is prohibited from working as a condition of the bond. Some will stop writing immigration bonds when the 'no work' bond condition goes into effect." Michael Hernandez, another Los Angeles bondsman who has discussed this issue with representatives of bonding companies in California and other states, concurred with Alter's assessment. The unwillingness of bonding companies to write immigration bonds with a no-work condition is a nationwide problem. Fourteen declarations by directors of pro bono legal services and immigration attorneys throughout the country have stated that bonding companies have made it clear to them that they will not place bonds with the INS, except in rare cases, if a condition of the bond prohibits the client from employment. Many bonding companies simply "will not put up collateral for an individual who is not allowed to work to pay off that bond." Enforcement of the regulation would have enormous implications in regions outside of the major metropolitan areas. The director of the Willamette Valley Immigration Project in Oregon found that "out-of-state bonding companies who ordinarily write immigration bonds will refuse to do so where a 'no-work' rider has been imposed. These companies represent the only alternative source of bond, since no such companies exist in Oregon." With bonding companies unwilling to place bonds with the INS, or willing to do so only by charging a substantially higher rate, a larger number of aliens will be unable to bond out and will simply remain in detention until their applications for withholding of deportation or for asylum are resolved.

Furthermore, relatives or friends may be more reluctant to serve as guarantors of an immigration bond which prohibits employment on its face. They may believe, correctly or incorrectly, that there is a greater likelihood that the bond would be forfeited. Thus, the no-work condition may deter potential guarantors; in fact, in at least one case, according

larly situated with regard to detention. The challenged regulation permits application for work authorization under another regulation, now recodified at 8 C.F.R. 274a.12(c)(13), if "compelling reasons" are shown. 8 C.F.R. 103.6(a)(2)(iii). However, under 8 C.F.R. 274a.12(c)(13), the alien cannot apply for this relief while he or she is detained. Application for authorization to work is dependent upon release from detention; release from detention is conditioned upon the promise not to work. Both detention and work are at stake here.

D. THE BURDEN OF PROOF AND PRESUMPTIONS

Finally, the parties dispute whether this is a "blanket provision" or a system of individualized determinations in which the burden has been shifted to create a presumption that work is unauthorized. We note that there are really two presumptions: first, that affected individuals can be detained, either absolutely or conditionally upon refraining from employment, and second, that they lack work authorization. The INS has done more than shift the "burden" of proving work authorization. It has added the burdens involved in extended detention.

The district court found that the no-work rider is a blanket condition. We agree with the district court. The regulation is mandatory and the condition will

to the uncontested evidence, the threat that the regulation would be implemented has already had such an impact.

However the INS may attempt to characterize the regulations, the ultimate result is that a substantially larger number of aliens will be unable to secure immigration bonds and will be detained indefinitely pending the resolution of their claims.

be applied to individuals in a great variety of situations. The provisions governing work authorization apply only after the condition has been imposed. Even if aliens in one or two categories were excepted from the condition, the possibility of obtaining work authorization for some aliens at a later time would not transform this into a system of individualized determinations. This is a blanket condition.

II. STATUTORY AUTHORITY FOR THE REGULATION

The Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., is a comprehensive legislative scheme intended to govern all aspects of the admission of aliens to the United States. Regarding arrest and custody of aliens subject to deportation hearings, it provides:

> § 1252. Apprehension and deportation of aliens. (a) Arrest and custody; review of determination by court. (1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody . . . [A]ny such alien taken into custody may, in the discretion of the Attorney Geenral and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. . . .

8 U.S.C.S. § 1252(a) (Law. Co-op.1987 & Supp. 1989).

The statutory question which has, from the outset, been presented in this case is whether the blanket imposition of a condition against employment in appearance and delivery bonds is within the discretion of the Attorney General under this provision. Since acquiescence in the provision is a condition of release from detention, and since violation of the condition would again lead to detention, we review both the power to detain and to impose the bond condition at issue. *See Flores v. Meese*, 906 F.2d 1315, 1322 (9th Cir. 1990) ("[S]ince the Attorney General's detention and bond release condition powers are interrelated, and their statutory evolution intertwined, we will examine them together"). We first examine the legislative history of the provision and the cases in which this statutory authority has been construed and applied, to determine the intentions of Congress and the basis on which discretion must be exercised. We then examine employment as a focus of the INA, including the amendments put in place by IRCA, for its relevance to the question of detention and bond conditions. We then review the cases which have ruled on bond conditions and similar restrictions imposed by the Attorney General under § 1252. We conclude, as have all prior opinions from this court and the district court, that this regulation is beyond the statutory authority conferred on the Attorney General by the INA.[8]

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[8] Because we hold the regulation unauthorized on statutory grounds, we do not reach the question of whether the regulation violates due process. *Jean v. Nelson*, 472 U.S. 846, 854-55, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985).

A. THE LEGISLATIVE HISTORY OF THE STATUTE

Section 242(a) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a), originated as Chap. 29, § 20 of the Immigration Act of 1917, which granted the agency responsible for immigration policy the power to release individuals on bond pending a deportation hearing. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917). Prior to 1952, § 20 made no reference to "discretion" and specifically limited the use of bonds to ensuring an alien's future appearance at a deportation hearing:

> Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond . . . conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917).

By 1950, Congress found this language inadequate to deal with its increased concern over subversion, since some courts construed the "may be released under a bond" language as a matter of right. *Carlson v. Landon*, 342 U.S. 524, 539, 72 S.Ct. 525, 533, 96 L.Ed. 547 (1952). Therefore, in 1950, Congress amended the immigration statute as part of the Subversive Activities Control Act. Internal Security Act of 1950, 64 Stat. 987, Title 1 (Subversive Activities Control Act of 1950), § 23. The provision regarding the Attorney General's discretion from the 1950 Act was incorporated into the 1952 Immigration and Nationality Act, and remains as § 242(a) today. Ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1252(a) (1988) [*sic*]; *see* H.R. Rep. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin.News 1653, 1711 ("This provision, in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950.").

We recently reviewed the legislative history of this provision in depth, *Flores v. Meese*, *supra*, at 1322-1325, and need only briefly reexamine it here. Congressional discussion of this statutory provision first appeared in the reports on H.R. 10, a bill that did not pass. H.R. Rep. No. 1192, 81st Cong., 1st Sess. (1949) ("Facilitating the Deportation of Aliens from the United States, Providing for the Supervision and Detention Pending Eventual Deportation of Aliens whose Deportation Cannot be Readily Effectuated Because of Reasons Beyond the Control of the United States"); S.Rep. No. 2239, 21st Cong., 2d Sess. (1950) ("Facilitating Deportation of Aliens"). The primary focus of these reports was on aliens who had been determined to be deportable but who had not in fact been deported. Congress was particularly concerned with dangerous aliens whose deportation could not be effectuated: Of the six examples given in the House and Senate Reports, two were Communist leaders who had been found deportable 18 years and 21 years earlier; four were criminals (two child molesters, two habitual criminals). H.Rep. 1192, 81st Cong., 1st Sess. (1949) at 8-9; S.Rep. 2239, 81st Cong., 2d Sess. (1950), at 7-8. As one measure of increasing control over deportable aliens, the bill authorized the Attorney General to hold arrested aliens in custody, release them on bond, or on conditional parole, pending final determination of their

deportability and for a six-month period after an order of deportation was issued. S.Rep. No. 2239 at 5.

The language of the bill placed no limits on the authority granted to the Attorney General. The original draft mandated that all bonds include a condition requiring the alien to appear when ordered to do so, but this requirement was dropped before the statute was enacted. The Congressional reports stated that the Attorney General was to have "untrammeled" authority to impose conditions; however, the examples of conditions which were listed in the reports were conditions applied to individual cases and concerned matters related to the appearance of the alien or the amount of the bond. H.Rep. 1192, 81st Cong., 1st Sess. at 6; S.Rep. 2239, 81st Cong., 2d Sess. at 5. Nothing else in the reports and nothing in the statute indicated what the range of permissible conditions might be or whether a blanket condition could be imposed.

B. THE EXERCISE OF DISCRETION

In *Flores*, we therefore found that the bill upon which this statutory section was patterned "was meant to confer broad power upon the Attorney General to detain aliens prior to a final determination of deportability," at 1325, and that the Attorney General was authorized to prescribe bond conditions "beyond merely insuring appearance." At 1325. The Attorney General's detention was "not limitless," but he had "broad discretion in acting to fulfill the purposes of [the immigration] laws." *Id.* Therefore, although "perhaps the primary purpose" of detention was securing appearance, we rejected an argument that any regulation regarding detention must have the *sole* purpose of ensuring appearance

at deportation hearings. The regulation in *Flores*, governing the release of alien minors to certain adults, was authorized by statute because it was rationally related to securing appearance. At 1326-1327 (noting that "the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings") (quoting 53 Fed.Reg. 17449). We noted that the regulation also served additional purposes rationally related to the statute, such as ensuring the well-being of alien minors, but found that the presence of these other purposes did not render the regulation beyond the Attorney General's rulemaking authority. At 1326-1327.

We commented that the statutory language "discloses no limitation on the Attorney General's detention power before an order of deportation is made final, except perhaps that implied by the word 'discretion.'" *Id.* at 1322. *Flores* did not review the cases which tested the statutory grant of discretion to the Attorney General to detain and set bond conditions. No such review was necessary, because the condition was rationally related to securing appearance, which we recognized as a primary purpose of the detention power. Once we determined conditions need not be concerned *solely* with appearance, we did not need to look farther.

However, these questions confront us now. The regulation at issue here bears no relation to ensuring appearance, nor has any such relation been claimed. Rather, the administrative notice promulgating the rule stated explicitly that prevention of employment by illegal aliens and safeguarding of employment of United States citizens and permanent resident aliens was more important than increased detention costs. 48 Fed.Reg. 51152.

We are therefore squarely presented with questions not at issue in *Flores:* In order to determine whether conditions are rationally related to the statute, we must determine how the statute has been construed. Since conditions are not limited to those *solely* concerned with ensuring appearance, we ask what limits constrain the power to detain and set conditions which Congress has granted to the Attorney General, and whether the condition imposed by the regulation at issue here falls within the limits of the Attorney General's discretion.

In *Flores*, we applied the standard first articulated in *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir.1972), which stated that the Attorney General's regulations must be upheld if they are founded on "considerations rationally related to the statute he is administering." *Flores, supra*, at 1322. *Flores* found we need only inquire into the existence of this rational relationship, *id.*, which it found met by the connection between securing appearance and releasing children only to certain adults.

In *Sam Andrews' Sons*, we made this inquiry, found that the rational relationship had not been established, and struck down for abuse of discretion a regulation which determined where alien commuters could be employed. The regulation in *Sam Andrews' Sons* provided that green cards could not be used to secure reentry into the United States for employment at a place of business where the Secretary of Labor had determined that a labor dispute existed. 457 F.2d at 747. We held this regulation not rationally related to the statute because it was not based on a rational distinction between different classes of aliens and because there was no hint in the statute or its legislative history that Congress intended the green card system to be used as a means to intervene in domestic labor disputes. *Id.* at 748.

To apply the "rational relationship" standard as articulated in *Sam Andrews' Sons* and *Flores*, we do not make sweeping statements regarding the statute's general concerns; rather, we must evaluate what the statute does and does not authorize in order to evaluate the regulation. We must inquire, as we did in *Flores*, whether the regulation is rationally related to the Attorney General's detention power. If it is, under *Flores*, the existence of additional purposes also rationally related to the statute will not render it invalid. *See Flores, supra*, at 1326-1327.

In *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952), the Supreme Court upheld the detention without bail under this provision of several Communist activists. In *Carlson*, the Supreme Court relied upon the purpose of the Internal Security Act to deport alien Communists as a menace to the public interest, and pointed to the evidence in each instance of "membership plus personal activity in supporting and extending the Party's philosophy concerning violence" which justified the Attorney General's discretion. *Id.* at 541, 72 S.Ct. at 534.

Carlson affirmed a Ninth Circuit decision which was part of a series of holdings defining the scope and proper exercise of the Attorney General's discretion. The aliens in *Carlson* first appealed when they were detained without bail pending determinations of deportability, and the district court ruled against them on habeas corpus. *Carlson v. Landon*, 186 F.2d 183 (9th Cir. 1950). We found the Internal Security Act was a constitutional response to a serious threat to national security. *Id.* at 187-188 (quoting Congressional findings of dangers of subversion). However, the provision governing detention before deportation hearings "does not give the Attorney General

or the Director absolute and final power to deny bail. Instead . . . [the provision] left bail to the discretion of the Attorney General rather than to his unlimited power to deny it. . . ." *Id.* at 185-86. The exercise of discretion was not consistent with the claim in the government's briefs "that the Director, under instruction from the Attorney General, can hold or release the alien without revealing his reason for the choice. . . ." *Id.* at 189. Although it was "arguable" that Congress might have meant to clothe the Attorney General with the unrestricted power to hold the alien without bail, this circuit and all other courts to address the subject agreed that "the Act cannot be so construed." *Id.* at 188.

The District Director of the I.N.S. had stated that he had reasonable cause to believe that Carlson's release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. But this assertion was insufficient: "[T]he power to grant bail before a deportation hearing or refuse it, carries with it the necessity of exercising discretion and certainly discretion must be based upon some phase of fact." *Id.* at 186. Detention could not be sustained without a statement of "some fact upon which a reasonable person could logically conclude that the denial of bail is required to protect the country or to secure the alleged alien's presence for deportation should an order to that effect be the result of the hearing." *Id.* at 189. The case was remanded for the Attorney General "to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail. . . ." *Id.*

In *Mangaoang v. Boyd*, decided days after the first *Carlson* opinion, we confronted slightly different facts. 186 F.2d 191 (9th Cir. 1950). Mangaoang,

the petitioner, declared there was a lack of evidence that he had ever been a member of the Communist Party, and that no evidence would be introduced that he was now a member or had been within five years before the warrant. *Id.* at 196. The District Director explained that the hearing would be held within two weeks, and that Mangaoang had been detained after the case had been examined in light of the Internal Security Act, considering all factors in the alien's situation and hardships which would be imposed. A message from the Assistant Commissioner of Immigration and Naturalization stated the aliens had been detained upon his order, under the authority of the Attorney General under the statute, following similar considerations to those the District Director described. *Id.*

We reversed the district court's judgment against the petition, which had been based upon "the error of law that proof of consideration of the facts relating to an alien under arrest was all that the situation required and that the Director was under no duty of revealing any of such facts." *Id.* at 197. Even though the hearings would be prompt and not drawn out, such evidence "does not satisfy the requirement that the denial of bail be based upon some specific fact pointing to the petitioners as bad risks to enlargement on bail." *Id.* at 196. Mangaoang did not again appeal the bail issue and appears not to have been further detained, though he successfully contested alienage.[9]

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[9] Mangaoang was later held not to have been an alien but a national of the United States during the period when he was a member of the Communist Party. He was therefore not deportable. *Mangaoang v. Boyd*, 205 F.2d 553 (9th Cir.), *cert. denied*, 346 U.S. 876, 74 S.Ct. 129, 98 L.Ed. 384 (1953).

In *Carlson*, on remand, the District Director gave specific evidence of continuing subversive activities by each of the aliens. The district court again upheld the denial of bail, and the aliens again appealed to the same panel of this court. *Carlson v. Landon*, 187 F.2d 991 (9th Cir. 1951). We explicitly stated our adherence to our earlier opinion, *id.* at 994, and summarized what the Attorney General must show: "discretion exercised . . . upon the question as to whether the release of appellants on bail would likely endanger the security of the United States and whether they likely would fail to present themselves at the deportation hearings." *Id.* at 993. The information that each of the detained aliens had been active in the Communist Party in 1949 provided the basis for the Attorney General's discretion in denying bail. "After viewing the whole case as to each petitioner," we affirmed the district court. *Id.* at 1003.

The aliens appealed to the Supreme Court, which affirmed in *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). Nothing in the *Carlson* opinion limited our holding that discretion must be exercised upon facts shown about each detained individual. The Supreme Court first stated that detention was consistent with the power to deport because "[o]therwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." 342 U.S. at 528, 72 S.Ct. at 528. Discretion to detain aliens without bail was placed in the Attorney General *because* "purpose to injure could not be imputed generally to all aliens subject to deportation. . . ." *Id.* Since the four petitioners in *Carlson* were active in Communist work and the petitioner in the companion

case was active in Communist activities, the discretion placed in the Attorney General was broad enough to justify detaining all these parties without bail "as a menace to the public interest." *Id.* at 541, 72 S.Ct. at 535.

Rather than changing our definition of the Attorney General's discretion, the Supreme Court's interpretation in *Carlson* supported it in several ways. First, more than mere membership in the Communist Party was required as a basis for detention. The requirement that the individual be *active* in subversive work as well as a member of the Party is significant, since membership in the Communist Party was sufficient to make an alien deportable. *Id. Carlson* cannot be read to support the current claim by the INS that *any* grounds for deportation will also be grounds for detention.

Further, this was not a blanket denial of bail. "There is no evidence or contention that all persons arrested as deportable under § 22 of the Internal Security Act . . . for Communist membership are denied bail." *Id.* at 541-42, 72 S.Ct. at 535. In fact, bail was allowed in most cases. *Id.* at 542, 72 S.Ct. at 535.

Finally, Congress' delegation of power to the Attorney General was permissible because the legislative standards were clear: "When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in the carrying out the objectives of the world communist movement, that alien may be detained." *Id.* at 544, 72 S.Ct. at 536. *Carlson* thereby confirms the requirement of individual dangerousness we had imposed in *Mangaoang* and the earlier *Carlson* opinions.

Discussing judicial review of detention decisions, *Carlson* quoted factors on which discretion was to be exercised from *United States ex rel. Potash v. District Director of INS*, 169 F.2d 747 (2d Cir. 1948) (*Potash*), a case under the old statute rather than under this statutory provision:

> The discretion of the Attorney General . . . is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

Carlson, 342 U.S. at 540, 72 S.Ct. at 534. These factors reflect the same focus on danger and, particularly, on specific evaluation of the individual.

In *Ocon v. Landon*, 218 F.2d 320 (9th Cir. 1954), we interpreted the same provision as part of the Immigration and Naturalization [*sic*] Act.[10] *Id.* at 322-323. Ocon had been released and redetained under this provision; he argued that the Attorney General would have to find new information against him in order to redetain him. *Id.* at 323. We held this detention permissible because there was evidence of his continued subversive activities.

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[10] Although Ocon's hearing had since been decided, the court analyzed his detention under 8 U.S.C. § 1252(a) because no "final order" had been issued as his case was still under review. *Id.* at 323. This is the same analysis followed by the District of Columbia Circuit in *Rubinstein v. Brownell*, 206 F.2d 449 (D.C.Cir.1953), *aff'd by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954).

Ocon acknowledged how great a power had been invested in the Attorney General by this provision:

> In reading Mr. Justice Black's dissent in the Carlson case, supra, it becomes apparent that he felt the impact of the jailing of a person who had not even been charged with a crime. We feel it too. . . . [but since Ocon did not deny any charges against him] his interim custody after continued and undenied Communist activity puts a different light upon [this] bald statement.

218 F.2d at 326. The *Ocon* court, like the earlier Ninth Circuit opinion in *Carlson*, justified this "jailing of a person . . . not even charged with a crime" by the dangers of subversion which Congress had recognized when it passed the Internal Security Act. Further, *Ocon*'s description of the detention power is a weighty one: "[I]t is the solemn duty of the Attorney General to revoke the bail the moment he has information which in reason appears to subject the United States to hurt by the alien while at large." *Id.* at 324.

However, even while it emphasized the extraordinary power and responsibility conferred here, *Ocon* held that the Attorney General must act "upon an *informed* discretion." *Id.* (citing *Carlisle v. Landon*, 73 S.Ct. 1179, 97 L.Ed. 1642 (Douglas, J., in chambers)) (emphasis in original). Discretion was "*informed*" when Ocon demonstrated "continued and undenied" Communist activity in the period before he was retaken into custody. *Id.* at 326. The court emphasized the dangers of subversion in this period and the nature of the Congressional response. *Ocon* quoted a statement from *U.S. ex rel. Yaris v. Esperdy*, 202 F.2d 109, 111 (1953), also quoted in

Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954), holding that the allegation of communist activity up to the time of rearrest refuted the claim of abuse of discretion in revoking bail.

Rubinstein v. Brownell held that the exercise of discretion must be a reasonable one, *id.* at 455, and that where the alien was *not* dangerous to society and there was no suggestion that he would flee or hide, the Attorney General could not detain him. *Id.* at 456. This is consistent with *Hernandez-Avila v. Boyd*, 294 F.2d 373 (9th Cir.1961), in which we found no abuse of discretion in high bail under this provision when the alien faced embezzlement charges in both the United States and Mexico, had no firm ties in the district where he was apprehended, and had repeatedly fled to avoid facing deportation.

From these cases emerges an unmistakable emphasis on the situation of each individual as the focus of the exercise of discretion. The significant power which is placed in the Attorney General must be exercised on the specific, individual circumstances of the person who faces the determination of his alienage or deportability under this statutory section. Further, the considerations involved are outlined consistently from *Potash* under the old statute, through *Carlson* and its connected cases under the Internal Security Act, through *Ocon* and *Rubinstein* under the INA. The detention power which the Attorney General is granted discretion to exercise is one concerned —in addition to ensuring appearance—with protecting the nation from danger, from active subversion.

This leaves us with two questions which must be answered in order to determine whether the challenged regulation imposing a condition against employment is within the discretion of the Attorney General: whether unauthorized employment is the type of harm or danger contemplated in the grant of this detention power, and whether bond conditions are limited by the scope of the detention power. We turn first to an examination of the question of unauthorized employment.

C. EMPLOYMENT IN THE LEGISLATIVE SCHEME OF THE INA

Before IRCA

Since 1952, Congress has amended the INA numerous times, including many provisions dealing with employment. However, it has never amended § 242 (a). *See generally* Hutchinson, Legislative History of American Immigration Policy 1798-1965 (1981); Harper, Immigration Laws of the United States (1975). Virtually every immigration act and amendment has dealt in some fashion with employment policy, and the Supreme Court has recognized that a "primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984).[11] However, even if employment is an important concern of immigration law, it does not at all follow that detention and bond conditions related to employment either cohere with the

[11] Although *Sure-Tan* also quoted *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), on the "peripheral" concern of the INA with employment, 467 U.S. at 892, 104 S.Ct. at 2808, both cases were essentially concerned with preemption or applicability of state or other federal laws. Neither case held that immigration policy was unconcerned with alien employment.

legislative scheme or are within the discretion of the Attorney General.

Nothing in the Act explicitly authorizes detention in relation to employment, and nothing suggests the appropriateness of *blanket* employment-related conditions. In fact, the INA draws careful distinctions between different categories of aliens based on family ties, student, business or professional status, and many other characteristics. 8 U.S.C. § 1101(a)(15)(A-N); 1101(a)(27)(A-I). A blanket condition barring employment is inconsistent with this complex legislative and regulatory scheme.

Prior to the enactment of the regulation, employment or the prospect of employment had generally been deemed a positive factor in determining the conditions under which to release aliens from detention. According to the undisputed evidence, in setting immigration bonds immigration judges frequently determined the amount of the bond "based on an assessment of the stability of the individual, with the prospect of employment being one of the most significant stabilizing facts. Unavailability of employment might result in substantially higher bonds, and a resulting substantial increase in the numbers of those unable to be bonded out." As the Director of the Center for Immigrant Rights stated in her declaration, "[t]raditionally, in bail reduction hearings, a job or an offer of a job has always been considered a positive element because that means stability and an assurance that the immigrant will not abscond." With the proposed no-work condition, the INS has effectively turned what was previously deemed a positive characteristic and an indicium of stability into a prohibited activity. The INS concedes that traditionally employment has been deemed a favorable factor: "De-

fendants admit that in the past in some bond proceedings immigration judges have considered the alien's employment history as indicative of stability and an assurance that he will not abscond." The INS claims, however, that "this is logically and legally irrelevant to this lawsuit. . . ." We disagree. To the extent that past practices are inconsistent with the proposed regulation, they are relevant to the question whether the no-work condition and detention in response to employment was authorized prior to the enactment of IRCA.

Further, our review of the treatment of employment riders by the Board of Immigration Appeals and the Attorney General discloses no authority for *detention* in relation to unauthorized employment. Employment riders were first applied to appearance and delivery bonds in the early 1970s, and the Board twice divided over their legality. *Matter of Toscano-Rivas*, 14 I & N 523, Int.Dec. #2256 (1973). Detention was not considered a permissible response to unauthorized employment: the INS had "emphatically disavow[ed] any general service policy of rearresting the recalcitrant alien who violate[d] the condition once released." *Id.* at 542. Only the money associated with the bond might be forfeited. *Id.* at 539 ("The penalty is not detention . . . but the loss of the $500"), 539 n.2 ("The threat of forfeiture of the bond is a deterrent. Custody is something else. Even if the bond is breached, it by no means follows that confinement is desirable or indicated, or will necessarily take place."). The attorney general's discretion regarding detention must be "based on a new and different set of considerations." *Id.* at 539 n.2. The BIA had found that detention was impermissibly implicated solely because it was the leverage by

which the agreement to the bond condition was extracted. *Id.* at 540-541. The language of the bond, attached to the Attorney General's opinion, reveals that the money was conditioned upon both the appearance of the alien and his refraining from employment unless authorized by the INS. *Id.* at 557-58.

At the request of the Board, the Attorney General examined the specific question of his authority to impose employment-related conditions. *Id.* at 550 (1974). Reviewing *Carlson*, *Rubinstein*, and *Witkovich*, the Attorney General found that employment-related conditions were clearly acceptable during the six month period after deportability was established in "cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security." *Id.* at 556. Obviously, availability and national security are the same considerations which underlie the detention power; this cannot be read as a firm conclusion by the Attorney General that the power to impose bond conditions was broader than the power to detain. The Attorney General went then on to suggest that "the various purposes of the immigration laws, including safeguarding employment opportunities for legal residents, *may* suggest the appropriateness of various bond conditions." *Id.* at 556 (emphasis added). However, he emphasized the necessity of a regulation to guide determinations of such bond conditions. Although non-standard riders already required approval by a regional commissioner, "additional substantive safeguards would be appropriate with respect to the condition at issue here." *Id.* at 556-57 & n. 23.

This review by the Attorney General, relied upon by the INS as authority for the challenged regulation, 48 Fed.Reg. 51142, is at most a tentative and

partial approval, under the statutory structure existing at the time, of the imposition of money bonds against unauthorized employment under carefully structured individual circumstances. It does not support the mandatory blanket no-work condition imposed by the regulation. *Toscano-Rivas* shows concern for the limits courts have placed on bond conditions and states the Attorney General's belief that individualized determinations with structured review procedures were necessary for any such condition to be imposed. The INS had disavowed any intention of detaining aliens who worked without authorization, and the Attorney General made no reference to such detention. Put another way, he claimed no unlimited power to detain under the INA, no authority to detain in response to employment violations, nor any authority that would have included blanket conditions. This brings us again to the point the district court and this court have reached before. Before IRCA, this regulation was beyond the authority conferred by the statute.

After IRCA

Ironically, although this case was remanded for further consideration in light of IRCA, both parties state that IRCA has made no difference to the authority for this regulation. The INS argues that our prior opinions were wrongly decided, and that IRCA merely re-emphasizes the concerns with employment which are evident in the INA. The NCIR argues that authority for the regulation never existed, and that IRCA has not granted such authority. We review the statute to determine whether IRCA changed the discretion invested by this provision or represented a Congressional finding regarding the dangers of unauthorized employment which would justify imposing the blanket no-work rider.

IRCA is a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected. *See* Mazzoli, *Immigration Reform: The Path to Passage and Beyond*, 14 J.Legis. 41 (1987) ("this legislation represents a delicate balance between widely divergent views and interests about immigration"). It states a tempered enforcement policy qualitatively different from the sweeping concerns with subversion of the Internal Security Act:

> Section 115. Enforcement of the Immigration Laws of the United States.
>
> It is the sense of Congress that—
>
> (1) the immigration laws of the United States should be enforced vigorously and uniformly, and
>
> (2) in the enforcement of such laws, the Attorney General shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens.

Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, 3384. *See* Montweiler, The Immigration Reform Law of 1986: Analysis, Text and Legislative History (1987).

In the Internal Security Act, Congress had made extensive and explicit findings regarding what it determined was grave danger to national security, emphasizing foreign direction and control of political movements, as well as the participation by individual "disloyal aliens" in these threats to national security. Internal Security Act of 1950, Sec. 2, *quoted in Carlson*, 186 F.2d at 187. A close examination of IRCA reveals that it clearly distinguishes employment concerns from threats to national security. Under Section 201(a) of IRCA, national security remains grounds for exclusion which may be waived in the course of legalization. 8 U.S.C. § 1255a(d)(2)(B)(ii)(IV). The paragraphs explicitly retained by IRCA exclude Communists, anarchists, or others who advocate the violent overthrow of the United States government. 8 U.S.C. § 1182(a)(28)(C), (D), (F). This provision also continues to exclude "[a]liens who . . . the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally *to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.*" 8 U.S.C. § 1225a(d)(2)(B)(ii)(IV); 8 U.S.C. § 1182(a)(27) (emphasis added).

In direct contrast, IRCA's legalization provisions specifically render *inapplicable* (not merely waivable at the Attorney General's discretion) the grounds for exclusion in the INA which govern aliens entering the United States for skilled or unskilled work without labor certification. 8 U.S.C. § 1255a(d)(2)(A); 8 U.S.C. § 1182(a)(14). Also, no alien may be found inadmissible on grounds concerned with becoming a public charge "if the alien demonstrates a history of employment in the United States evidincing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii). The structure of the grounds for exclusion shows that Congress did not consider unauthorized employment by individual aliens as the sort of danger to the nation addressed in § 1182 and the Internal Security Act.

In addition to these distinctions in the text of the statute, the legislative history of IRCA reveals a carefully crafted, balanced approach to the problems of illegal immigration. The Senate Report explained that "The Committee bill is intended to increase control over illegal immigration," and that "[t]he pri-

mary incentive for illegal immigration is the availability of U.S. employment." S.Rep. 99-132, 99th Cong., 1st Sess. 1 (1985). The report described serious problems associated with illegal employment, including loss of jobs for low-income Americans, *id.* at 5-6, but also emphasized that many problems caused by illegal immigration arose from difficulties with assimilation into America.[12] The Senate placed particular significance on these social factors:

> Although population and direct economic impacts are of great significance, we think most people would agree that the national interest of the American people also includes certain even more important and fundamental aspects, such as the preservation of freedom, personal safety, and political stability—as well as the public cultural qualities and the political institutions which are their foundation.

Id. at 6.

Similarly, when the Senate explained "[t]he [s]olution" embodied in IRCA, *id.* at 7, it first noted that there were "only two types of solution available

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[12] If immigration is continued at a high level, yet a substantial portion of these new persons and their descendants do not assimilate into the society, they have the potential to create in America a measure of the same social, political, and economic problems which exist in the countries from which they have chosen to depart. Furthermore, if language and cultural separatism rise above a certain level, the unity and political stability of the Nation will—in time—be seriously diminished. Pluralism, within a united American nation, has been the single greatest strength of this country. This unity comes from a common language and a core public culture of certain shared values, beliefs, and customs which makes us distinctively "Americans."

S.Rep. 99-132, 99th Cong., 1st Sess. 7 (1985).

to the problem of illegal immigration." *Id.* It then described these two different aproaches to illegal immigration. The first was *direct enforcement*, which included physically preventing entry into the United States through border patrol and interdiction, and finding and deporting those who were successful in entering illegally or entered legally and then violated the terms of their visas.[13] The second approach involved *reducing the incentives to enter*. IRCA's solution was a program "which combines direct enforcement at reasonable levels with a reduction in the incentives to enter the United States." *Id.* at 8.

Reducing the incentive of unauthorized employment was key to reducing incentives to enter. These incentives to enter illegally were created by the disparity in job opportunities between the United States and the Third World. *Id.* In light of the difficulties of changing these incentives in the short term by directly tackling this substantial disparity through Third World development, and the unacceptability of reducing the disparity through deterioration in the United States, "only one approach remains: to prohibit the knowing employment of illegal aliens." *Id.* Therefore, the Senate chose to penalize "employers who knowingly employ illegal aliens and . . . persons who knowingly and for a fee or other consideration recruit or refer for employment such illegal aliens." *Id.*

Following this approach, the principal sanctions in IRCA are aimed at employers. Section 101 of the Act establishes penalties making employment of unauthorized aliens unlawful. 8 U.S.C. § 1324a. The em-

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[13] In the introduction to the Report, the Senate had noted the sense of Congress that resources for direct enforcement and immigration services should be increased. *Id.* at 1.

ployer is required to keep records of the verification of employees' eligibility to work. 8 U.S.C. § 1324a (b) (1) (c). Civil and criminal penalties are provided for violations. 8 U.S.C. § 1324a(e), (f).

While the INS argues that the authority to detain aliens is consistent with the goals and objectives of IRCA, the legislative history reveals otherwise. The regulation disrupts the careful balance which Congress achieved in IRCA. While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals. *Immigration Control and Reform Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S.Hrg. 99-273, at 56, 59 (In response to the proposal that aliens be fined or detained as a deterrence to illegal immigration, Senator Simpson, the Chairman of the Senate Judiciary Committee, stated that this was not a new recommendation, but one that had previously been suggested and rejected). *See also* 118 *Cong.Rec.* H30155 (daily ed. Sept. 12, 1972) (statement of Rep. Rodino) (the House Judiciary Committee decided not to impose any additional criminal sanctions or other penalties on employees, believing that such penalties "would serve no useful purpose"). Instead, it deliberately adopted sanctions with respect to the *employer* only. Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work. During the extensive debates and hearings conducted during earlier attempts to enact similar legislation, the INS specifically agreed that employee sanctions, such as denying aliens employment pending deportation hearings or detaining aliens, should be rejected. James

Hennessey, the Executive Assistant to the INS Commissioner, testified that the INS would not attempt to control employment during deportation proceedings:

> Rep. Rodino: [During deportation proceedings] the fact that an illegal alien is a holder of a job or some employment, means that there is no such surveillance on the part of the Service or anybody that he won't be holding the job?
> Mr. Hennessey: He will undoubtedly continue. In fact, having still the right to go before the Board [of Immigration Appeals], I don't think we could attempt or ask for any legislation that he not hold the job. We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him.

Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No. 13 pts. 1-5, pt. 1 at 46. Even an INS District Director for Detroit Michigan who favored administrative action against illegal aliens who worked, explicitly rejected detention as a means of curtailing immigration:

> Mr. Pederson: I believe that we ought to impose a penalty against the alien to help stop him [from working].
>
> Rep. Rodino: What kind of penalty would you impose on the alien?
>
> Mr. Pederson: Well, I do no feel that a fine or imprisonment is the answer but I do feel that there should be some form of sanction. It could be possible to deny administrative relief of some form.

Id., pt. 3 at 919. The House Judiciary Committee concluded at the end of this round of hearings that "[t]he illegal entrant should not be subject to additional penalties. . . ." *Id.*, pt. 1, at 90.

Although some continued to argue for restraints against the employee, the approach of controlling employment through *employer* not *employee* sanctions was adjudged by Congress to provide the only realistic and appropriate solution.[14] As stated in the final House report, employer sanctions, "coupled with improved border enforcement, is the *only* effective way to reduce illegal entry and in the Committee's judgment it is the most practical and cost-effective way to address this complex problems." H.R.Rep. No. 99-682(I), 99th Cong., 2nd Sess. 49, *reprinted in* 1986 *U.S.Code Cong. & Admin.News.* 5653 (emphasis

[14] As late as 1985, researcher Dr. Barry Chiswick again proposed to the Senate Immigration Subcommittee that a policy of detaining "illegal worker for a period of several months prior to deportation" should be adopted as a means of deterring illegal immigration. He believed that "[d]etention may be the only mechanism for reducing the extent to which the border is treated as a resolving door" and "a fine in terms of time—detention—for several months would be costly to the alien and have a deterrent effect." Thus, he strongly advocated the policy which in effect the INS seeks to implement through the proposed regulation, asserting that detention would "offer a better hope than . . . employer sanctions." *Immigration Control and Reform Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S.Hrg. 99-273, at 44-45. Senator Simpson, the Committee Chairman, noting that the proposal was "not something new," and rejected it as "politically harsh [and] unrealistic." *Id.* at 56. He opposed the detention proposal and recommended that Congress try the "most humane" and "the most sensible humanitarian approach", employer sanctions, first before considering harsher measures. *Id.* at 59.

added). Thus, Congress adopted "a graduated three-step series of administrative, civil, and criminal penalties for *employers* violating this prohibition." *Id.* at 5656 (emphasis added). The INS regulation would override the clear policy choice which Congress made in IRCA, and would upset the careful balance which Congress achieved in that legislation. The no-work bond condition, and the detention of individuals who violate that condition, is the very type of employee deterrence mechanism which Congress rejected in IRCA. By administrative decree, the agency would now adopt a drastic employee sanction in contravention of a contrary determination by the legislature—and in conflict with the agency's representations before Congress.

Further, while the bond condition has great impact upon the individuals to whom it is applied, it does not reach the vast majority of those who work without authorization. Most aliens arrested by the INS agree to voluntary departure without a hearing. *INS v. Lopez-Mendoza*, 468 U.S. at 1044, 104 S.Ct. at 3486 (97.5% departed without a hearing). Similarly, the regulation does not affect unauthorized employment by those who are released on parole rather than on bond. Therefore, most of those who might work without authorization will not find their incentives to illegal immigration affected by this regulation.

The other provisions of IRCA provide no support for the regulation. Section 103 imposes penalties of fines or imprisonment for fraudulent use of immigration documents or false attestations used to satisfy the verification requirements imposed on employers by the Act. 18 U.S.C. 1546. Section 111 deals with appropriations for enforcement and service activities of the INS, including direct border patrols, enhanced

community outreach, and adjudication of petitions and other applications under the INA. Pub.L. No. 99-603, 100 Stat. 3381. Section 112 is concerned with penalties for transporting aliens into the United States in violation of the immigration law and, consistent with employer sanctions, removes an exception which had previously exempted employment from penalties for harboring aliens. 8 U.S.C. § 1324(a).

Section 102 includes a carefully drawn provision in which Congress prohibits employment discrimination based on national origin or citizenship. 8 U.S.C. § 1324b. This protection extends to aliens who intend to become citizens, as well as current United States citizens. 8 U.S.C. § 1324b(a)(1)(B), (a)(3)(B). Much of the rest of IRCA is concerned with the legalization of aliens formerly here illegally, a Congressional choice in sharp contrast with the focus of the Internal Security Act on deporting *all* alien Communists, summarized in our first *Carlson* opinion as an authority arising from a "moving factual appraisal of an outstanding conspiracy of aliens and a few mentally intoxicated or drugged citizens and a sprinkling of the vicious, directed by a foreign government." *Carlson*, 186 F.2d at 187.

The emphasis on employer sanctions in IRCA militates against reading in the authority to detain individuals to prevent them from working. The emphasis on the rights of aliens as well as citizens shows a concern for fair and humane enforcement of the immigration laws which is at odds with the blanket no-work rider. It is hard to conceive that Congress, which adopted employer sanctions in the belief that it is "the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens," would condone the harsh and inhumane measures at issue here. H.R.Rep. No. 99-682(I),

99th Cong., 2nd Sess. 46, *reprinted in* 1986 *U.S.Code Cong. & Admin.News 5650*. The regulation is unlikely to affect those considering traveling to this country because of the lure of jobs; it would, however, have a drastic affect on individuals already in the United States, who may well have a legitimate claim to remaining here. The regulation would force the latter group to choose between starving on the streets or remaining in detention. Any effort on the part of individuals to work in order to pay for food, shelter, medical care, or to provide for their families, pending resolution of their cases may land them back in jail. The other options might be even less desirable, not only for the aliens but for society as a whole. Surely, Congress could not have intended to reduce these claimants—some legitimate and likely to become future citizens—to such choices in order to survive.

In contrast to Congress' approach in the Internal Security Acts, in which Congress supported detention of alien communists with lengthy findings on the dangers of subversion, Congress in IRCA showed no interest in expanding detention of aliens. The detention presented by the regulation at issue here—detention to prevent unauthorized employment—runs contrary to the fundamental policy determinations made by Congress in enacting the legislation involved. IRCA shows a congressional choice to reduce employment incentives by sanctioning employers, not employees.

Unlike *Flores*, *supra*, where we addressed a regulation which did not conflict with congressional judgment, here we confront a regulation contrary to a congressional policy clearly elaborated in IRCA. Congress made its view known by rejecting provisions for employee sanctions. That rejection necessarily includes sanctions that flow from violations of bail

provisions or from incarcerations for refusing to agree not to work.

The only mention of bonds for employees in IRCA is an explicit prohibition which prevents employers from shifting the burden of sanctions. Section 101 includes a provision entitled "Prohibition of Indemnity Bonds," which states:

> (1) Prohibition. It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

8 U.S.C. § 1324a(g)(1). Violations of this prohibition are subject to civil penalties. 8 U.S.C. § 1324a (g)(2).

The regulation on alien commuters in *Sam Andrews' Sons*, lacked rational relation to the statute because nothing in the statute intimated that Congress intended the green card system to be used as a means of Government intervention in domestic labor disputes. 457 F.2d at 745. There is nothing in IRCA which sanctions money bonds of the type once contemplated in *Toscano-Rivas* being placed upon individual alien workers, and nothing which sanctions detention to prevent these individuals from working. Since the bond condition here is unrelated to the danger of subversion considered by the Internal Security Acts and is contrary to congressional judgment in IRCA, we conclude that to increase detention through use of the rider is an abuse of the Attorney General's discretion.

D. CONDITIONS PLACED UPON BOND

Finally, we must inquire into what bond conditions can be imposed under this statutory section. In *Flores*, we characterized the regulation governing the release of alien minors as a condition on release, rather than a condition of bond. Still, *Flores*, requirement of a rational relationship to the statute and our approval in that case of the regulation regarding children must be considered in evaluating bond conditions. Because *Flores* found a relationship to appearance, however, it did not evaluate prior cases to determine what other conditions might be imposed in the absence of the power to detain.

Few cases reviewing permissible conditions on bond have arisen under § 1252(a). We examine these cases and find additional guidance in Supreme Court decisions under § 1252(d) which make an explicit comparison with § 1252(a). The cases reveal that the decision to impose conditions upon release must also be guided by informed discretion and does not extend to imposing any condition at all, even when an alien might have been initially detained. When detention is not at issue, the Supreme Court has limited conditions to those related to the alien's appearance for deportation proceedings.

After *Carlson* was affirmed in the Supreme Court, the INS introduced a new type of bond, laden with controlling conditions, for aliens awaiting deportation proceedings. *Yanish v. Barber*, 73 S.Ct. 1105 (1953) (Douglas, J., in chambers). One condition on Yanish's bond barred Yanish from associating with any person who he knew or had reason to believe was a Communist. "[T]aken literally [the condition] would prevent him from living with his Communist wife or going to a movie with his Communist son or seeing

his Communist legal adviser or being treated by his Communist doctor." Justice Douglas granted bail without the conditions. *Id.* at 1108-9.

In *Carlisle v. Landon*, 73 S.Ct. 1179 (1953) (Douglas, J., in chambers), the distinction between the initial discretion to detain and the power to impose conditions was even more closely presented. Carlisle was one of the defendants whose detention was upheld by the Supreme Court in *Carlisle v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). Bail had been granted during the course of the earlier proceedings. Carlisle continued his appeal on the basis that the only recent evidence against him was association with groups found to be "subversive" or "Communist front" organizations, rather than activities within the Communist Party itself. *Id.* 73 S.Ct. at 1180. During his appeal, under the provisions of 242(a), the Attorney General required a bond with conditions similar to those imposed in *Yanish v. Barber*. *Id.* 73 S.Ct. at 1179. When Carlisle refused to accept the new bond, he was redetained. *Id.* at 1181.

Justice Douglas granted bail. During the time Carlisle had been at large he had not done a single unlawful act; he merely refused to execute "the Yanish type of bond." *Id.* at 1182. "Up until then his enlargement on bail had been deemed wholly consistent with the national security. Once he refused to execute the new type of bond he was deemed sufficiently dangerous as to be taken into custody once more." *Id.* at 1182. Justice Douglas found that Carlisle was being detained "solely because he is not amenable to the desires of the Attorney General. That too would be permissible if the Attorney General has acted within the scope of his authority," but that authority was in doubt.

Carlisle anticipated resolution by the Supreme Court of the question of the Attorney General's authority to impose bond conditions. However, the lawfulness of restrictive conditions was finally tested in relation to aliens who had been proved deportable and were under continued orders of supervision under 8 U.S.C. § 1252(d). Although early drafts of this provision had authorized indefinite detention of aliens after deportability was determined, indefinite detention was later dropped from the statute to avoid a constitutional question. *U.S. v. Witkovich*, 353 U.S. 194, 200-201, 77 S.Ct. 779, 782-83, 1 L.Ed.2d 765 (1957). Criminal penalties for violations were imposed instead. S.Rep. 2239, *supra*, at 8. The provision authorized the Attorney General, among other things, to require the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." It also required the alien to "conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case." 8 U.S.C. § 1252(d).

In *Witkovich* and its companion case, *Barton v. Sentner*, 353 U.S. 963, 77 S.Ct. 1047, 1 L.Ed.2d 901 (1957), the Supreme Court limited the apparently broad discretion granted the Attorney General under 8 U.S.C. § 1252(d), holding that conditions must be related to ensuring the alien's appearance for deportation. "A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, by the persuaisve gloss of legislative history or by the rule of constitutional adjudication, relied on by the District Court, that such a restrictive meaning must be given if a broader meaning would generate

constitutional doubts." *Witkovich*, 353 U.S. at 199, 77 S.Ct. at 782. The Court restricted the statutory grant of authority despite Congressional intent to control subversive aliens who could not be promptly deported, *id.* at 200-201, 77 S.Ct. at 782-83, which was the main focus of the original Senate and House Reports on the provision, *see generally* S.Rep. 2239, 81st Cong., 2d Sess. (1950); H.R.Rep. 1192 (81st Cong., 1st Sess.).

In *Witkovich*, the Court held that an alien being supervised more than six months after his deportation had been ordered could not be forced to give information about matters unrelated to his readiness for deportation. 353 U.S. at 200-201, 77 S.Ct. at 782-83. Although *Witkovich* dealt only with what information could be required of an alien and distinguished the potentially long duration of supervision under 1252(d) from the "customarily brief" period during which active alien Communists could be detained before deportation hearings, *see* 353 U.S. at 198, 77 S.Ct. at 781 (noting that *Carlson* concerned detention of "active alien Communists"), at 201, 77 S.Ct. at 783 (noting that detention of aliens pending determination of deportability was was "customarily brief"), *Sentner* established additional substantive limits.

Sentner concerned the Attorney General's authority to prescribe "reasonable written restrictions" on the alien during this period. The restrictions placed on Sentner more closely resembled the condition against employment. Sentner had been supervised under an order which forbade her, among other things, to violate the Smith Act, a deportable offense subject to criminal penalties. *Sentner v. Colarelli*, 145 F.Supp. 569 (E.D.Mo.1956), *aff'd per curiam sub nom. Barton v. Sentner*, 353 U.S. 963, 77 S.Ct. 1047, 1 L.Ed.2d

901 (1957). The supervisory powers conferred by statute could not be used as an indirect means of implementing penalties which already existed under the Smith Act nor adding to the penalties she faced. 145 F.Supp. at 575. Since this provision would not affect most subversives, but only deportable aliens under supervision while awaiting deportation, Congress would not be assumed to have delegated this additional authority in such general terms. 145 F. Supp. at 576.

Sentner also held that the alien could not be restricted from membership in the Communist Party, furthering its policies, or associating with Communists. *Id.* at 576-579. Six months after deportability was determined, the only power the Attorney General had was to deport the alien or to supervise her. Supervision was not an end in itself but merely an auxiliary to the power to deport. *Id.* at 577. Statutory interpretation and the principle of avoiding constitutional questions mandated this restrictive reading of the statute. *Id.* at 577-79, 583.

The *Sentner* court read the power to detain reviewed in *Carlson* as concerned with national security, *id.* at 577, 579, and explicitly compared the statutory provision under review there with the one we review here: "It might be suggested . . . that the Attorney General has been authorized to prescribe any reasonable written regulation calculated to protect the security of the nation, a standard more or less similar to the standard guiding the exercise of his discretion to detain without bail under Section 242(a)." 145 F.Supp. at 579. Even if the statute authorized such discretion, the conditions imposed would constitute an abuse of discretion in the absence of any threat to national security. *Id.* Restrictions on her conduct were limited to those which

would ensure her availability for deportation. *Id.* at 577, 582-83. The Supreme Court affirmed over a dissent which complained that this significantly enlarged the holding of *Witkovich*. 353 U.S. at 963, 77 S.Ct. at 1047.

Together, the cases on bond conditions show the limits of the Attorney General's power to impose conditions on release. *Sentner's* refusal to find a grant of Congressional authority to control Smith Act violations through this provision is significant: since most aliens arrested by the INS take voluntary departure, *INS v. Lopez-Mendoza*, *supra*, restrictions on bond conditions only reach a fraction of the population whose employment is regulated under the INA. *Sentner* and *Witkovich* read section 242(a) as concerned with national security. The power to supervise aliens was an auxiliary of the power to deport, not an end in itself. These cases demonstrate that conditions are limited by the same factors which constrain detention: where there is no power to detain, conditions must be related to ensuring the alien's appearance.

CONCLUSION: THE ATTORNEY GENERAL'S DISCRETION

The essence of the INS position is that when this provision became part of the INA, the power to detain and to impose conditions of bond was vastly increased: from a focus on ensuring appearance or averting serious danger to the nation, such power could now be exercised for any purpose related to the immigration laws. We question whether Congress could have intended such an expansion of discretion without discussion, and our review discloses no authority for this position. In fact, we recently noted

the importance of appearance as a focus of the detention power—a position which is consistent with our historic interpretation of this provision. *Flores*, *supra*, at 1326. In *Sam Andrews' Sons*, we did not rely on the breadth of the INA and its ability to control employment generally, but focused on the goals and purposes of the various provisions of the statute. Case law has established the purpose and limits of the detention power.

In *Ocon*, we treated the Attorney General's discretion under the INA as coextensive with his discretion under the Internal Security Acts; however, *Ocon* concerned an individual who would have been in custody under the Internal Security Acts as well. *See also Sentner v. Colarelli*, 145 F.Supp. 569, 577, 579, *aff'd per curiam* 353 U.S. 963, 77 S.Ct. 1047, 1 L.Ed.2d 901 (1957) (Congressional grant of authority to Attorney General under section 242(a) for purposes of national security). In *Flores*, we noted the requirement of rational relationship to the statute, but did not decide whether this had changed the detention power. *Flores* was in accord with our earlier cases, since the condition it considered was rationally related to ensuring appearance, as was the high bond in *Hernandez-Avila v. Boyd*, *supra*.

The Supreme Court's affirmance in *Rubinstein v. Brownell* answers the question of the continuity of scope of this provision, since it presented the case of an alien who would not have been detained under the Internal Security Act. 206 F.2d 449 (D.C.Cir.1953) *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954). Rubenstein had been convicted of draft evasion and served time in prison; he had a criminal record. Yet he was "not hostile to the Government or likely to engage in subversive, criminal, or reprehensible activities. . . ."

206 F.2d at 456. There was "no suggestion that he [would] flee or hide." *Id.* He could not be continued in custody under this provision without any indication that he would hurt the country or would flee. Absent such a determination, his detention would have been an abuse of discretion. *Id.* Under *Rubinstein*, therefore, the Attorney General's detention power remained unchanged when this provision became part of the INA.

Whenever the authority granted by this provision was judicially tested under either statute which contained it, the Attorney General's discretion was found to be similar in scope. At the time the provision was enacted, this circuit examined its impact in the light of what we determined was "our government's resistance to as venal an attack on its very existence as the long story of 'man's inhumanity to man' reveals." *Ocon*, 218 F.2d at 326. In the crucible of concern with national security, we found no broader authority than this:

The Attorney General does *not* have unlimited power to detain. *Carlson*, 186 F.2d at 185. The claim of unlimited power to detain is not, in fact, the exercise of discretion. *Carlson*, 186 F.2d at 189 (Director had argued in the briefs that there was "no question of discretion" but an authority to hold or release an alien without revealing his reason for the choice); *Mangaoang*, 186 F.2d at 197 ("*if* he did exercise discretion in denying bail") (emphasis added). Discretion is delegated to the Attorney General because evil purpose cannot be imputed to all aliens. *Carlson*, 342 U.S. at 538, 72 S.Ct. at 533. He must exercise "*informed* discretion." *Ocon*, 218 F.2d at 524, citing *Carlisle v. Landon*, 73 S.Ct. 1179 (Douglas, J., in chambers). The exercise of this discretion rests upon actions showing participation in activities which endanger the country, in addition to the status (i.e., Party membership) which makes each individual deportable. *Carlson*, 342 U.S. at 541, 72 S.Ct. at 534; *see also Carlson*, 186 F.2d. The short duration of detention is not the critical factor. *Mangaoang v. Boyd*, 186 F.2d at 196. "[T]he denial of bail must be based upon some specific fact pointing to the petitioners as bad risks to enlargement upon bail." *Id.*

This controlling authority disposes of the most fundamental claim made in the briefs of the INS: "Once there are sufficient grounds to warrant the arrest of a person as a deportable alien, *any* release is a matter of grace, grantable and revocable by the Attorney General at his discretion." Brief for Appellant at 18. Grounds for deportation are not automatically grounds for detention. Further, the emphasis in these cases on facts as to each individual forecloses the Attorney General's "discretion" to put in place a "presumption" that work is unauthorized, if such a presumption will lead directly to detention. This is supported by the Attorney General's own evaluation of the scope of his discretion in *Toscano-Rivas, supra*, which claimed no power to detain in response to illegal employment and emphasized the need for "substantive safeguards," contemplating *only* individualized decisions.

The exercise of discretion under the statute must be based on specific facts regarding the individual related to reasons why he is a poor risk for enlargement upon bail or may endanger the nation while he is at liberty. Because the blanket condition is not individualized, it could not be considered informed grounds for detention. Unauthorized employment has discretion even if unauthorized employment were

never been held to justify detention, and IRCA made no findings of danger to the nation like the Congressional findings in the Internal Security Act. Informed discretion is incompatible with a blanket no-work provision. The regulation was promulgated beyond the authority delegated by the statute.

The judgment of the district court is AFFIRMED.

TROTT, Circuit Judge, Dissenting:

After *Flores v. Meese*, 913 F.2d 1315, 1322 (9th Cir.1990), our task in this case is uncomplicated: we must decide if the regulation under scrutiny is founded on considerations rationally related to the statute from which it derives.[1] Majority op. at 1360. The answer to this question appears simple.

An unmistakable purpose of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* ("INA") is to

> provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

H.R.Rep. 1365, 82d Cong.2d Sess. 51 (1957). As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct.

[1] *Flores* holds that the Attorney General is authorized to prescribe bond conditions "beyond merely insuring appearance," At 1325, a holding recognized by the majority opinion and applied in this case.

2803, 2809, 81 L.Ed.2d 732 (1984). This purpose, if anything, was fortified by the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) which reiterated the desire of Congress to erect at the borders barriers designed to protect U.S. citizens, and others here with lawful permission to work, from competition by illegal aliens not authorized by law to work in this country. The objective of this Act was to stop illegal aliens from working, period.

This proposition to me is so clear that, with all respect to my distinguished and esteemed colleagues, I do not see how it can be debated. I am unpersuaded by the majority opinion's attempt to escape the inexorable weight of the evidence on this issue. The majority opinion's attempt to find something to the contrary in the IRCA's adoption of employer sanctions is thoroughly unpersuasive. In no way do the existence of employer sanctions suggest or imply that unauthorized work by illegal aliens is somehow acceptable. The choice of sanctions does not alter the primary thrust of the legislative scheme which is to deter and to prevent unauthorized employment. Unauthorized employment by illegal aliens remains illegal, and, illegal aliens who are working without lawful authority are still expected to be stopped and to be calendared for removal from the country.

The disputed regulation furthers this goal. It says to persons apprehended and waiting to be considered for deportation that if they are to be released on bond pending resolution of the proceedings, they cannot work. In my view, the majority opinion improperly invades the province of the Attorney General, and I would reverse the district court.

But I am not sure what this case is about. The INS in its brief assures us that the disputed regula-

tions "bar only *unauthorized* employment" (emphasis in original). I read the majority opinion as being willing to go along with such a regulation, but not having any confidence in the integrity of INS's representation, choosing instead to try to find a way to discount it and construe the regulation as covering *all* employment, even if otherwise lawful or authorized. Majority op. at 1353-1354. The majority opinion in essence prohibits the INS from doing something it claims it does not want to do, i.e., bar all employment by persons released on bond, even if the person has a legitimate right to work. This puts us in the position of refereeing a noncontroversy. I suppose its none of my business, but it seems the way out of this power struggle is for the INS to cure the ambiguities in its regulatory scheme so that the regulations accurately reflects its objective, which is to prevent aliens who are not authorized to work from doing so while they are out on bond. This hardly seems controversial. If that is all INS wishes to do, it has the untrammeled power to get it over with and end this debate.

I DISSENT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5774

D.C. No. 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION & NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed Dec. 21, 1989

OPINION

Before: WARREN J. FERGUSON, STEPHEN REINHARDT, and STEPHEN S. TROTT, Circuit Judges.

PER CURIAM:

This case involves the question of the validity of an Immigration and Naturalization Service ("INS") regulation that requires the inclusion in release bonds of a blanket condition prohibiting aliens from engaging in employment pending the outcome of their de-

portation hearings. The National Center for Immigrants' Rights, Inc., and a number of other organizations and individuals, requested a declaratory judgment that the regulation exceeds the scope of the Attorney General's statutory authority, and a permanent injunction against its implementation. The Immigration and Naturalization Service, Alan Nelson, Commissioner, and Attorney General William French Smith were named as defendants. The district court granted summary judgment to the plaintiffs. A notice of appeal was timely filed. The caption of the notice reads, "National Center for Immigrants' Rights, Inc., et al., Plaintiffs, v. Immigration and Naturalization Service, et al., Defendants." The body of the notice states, "Notice is hereby given that defendants in the above-referenced action hereby appeal to the United States Court of Appeals for the Ninth Circuit. . . ." The appellees now challenge the adequacy of the notice of appeal.

The appellees, relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405 (1988), have filed a suggestion that we dismiss the appeal for lack of jurisdiction. They interpret *Torres* as standing for the proposition that under Rule 3(c) of the Federal Rules of Appellate Procedure the names of the parties appealing must be listed in the body of the notice of appeal. Failure to do so, argue the appellees, necessitates dismissal of the appeal. *Torres*, however, does not stand for such a broad nor exacting proposition. In *Torres*, a notice of appeal from a judgment of dismissal listed the names of 15 out of 16 plaintiffs as parties to the appeal in the body of the notice, but did not list the petitioner. "It is undisputed that the omission [of the petitioner's name] in the notice of appeal was due to a clerical error," but since the petitioner "was never named or

otherwise designated" when all the others were specifically named, the notice of appeal failed to give "fair notice of the specific individual or entity seeking to appeal." *Id.* at 2407, 2409. The use of the phrase "et al." in the caption also failed to provide notice of a particular defendant's intent to appeal. *Id.* at 2409. Thus, the court of appeals properly held that the judgment of dismissal was final as to the petitioner. *Id.*[1]

The case at hand, in contrast, presents an entirely different question. Here, no names were listed in the body of the notice, and no individual was inadvertently omitted as a result of clerical error. Instead, the term "defendants" was used in the body of the notice. The issue before us is whether that term fairly indicates that *all* and not just *some* of the defendants are appealing the decision below. We think that clearly it does.[2]

We hold that *Torres* does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiffs

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[1] Appellees also rely on *Allen Archery, Inc. v. Precision Shooting Equipment*, 857 F.2d 1176 (7th Cir. 1988), a case in which there were two defendants, Precision Shooting and Shepley, but the notice of appeal stated only "Precision Shooting Equipment, Inc., defendant, hereby appeals. . . ." The Seventh Circuit held that the notice did not constitute an appeal on the part of Shepley. As is clear from the text of our decision, *infra*, the holding of *Allen Archery*, like that of *Torres*, is of little relevance to the issue before us.

[2] Even if "defendants" only referred to some defendants we would not dismiss the entire appeal; for jurisdiction would exist as to the Immigration and Naturalization Service, the defendant specifically named in the caption of the notice of appeal. *Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114 (1st Cir. 1989).

or defendants, adequately identifies them. We find the reasoning of the Sixth Circuit in *Ford v. Nicks*, 866 F.2d 865, 870 (6th Cir. 1989), on this point persuasive. The body of the notice in *Ford* stated that "[n]otice is hereby given that the defendants' appeal to the United States Court of Appeals for the Sixth Circuit. . . ." *Id.* at 869. The court reasoned that "[t]here are some 18 defendants, and the statement that 'the' defendants are taking the appeal gives fair notice that all 18 desire to be appellants, not just some of them. . . . We think it would be manifestly improper for us to read the words 'the defendants,' in the body of the instant notice, as meaning Chancellor Roy S. Nicks only. The other defendants may have been designated somewhat 'inartfully,' to borrow the adverb used in *Torres*, but to say that they were not designated at all would be untrue." *Id.* at 870.

Following the reasoning of *Ford*, we find that the notice of appeal here is also proper. Although the caption reads "Immigration and Naturalization Service, et al." the body of the notice reads "[n]otice is hereby given that defendants in the above-referenced action hereby appeal. . . ."[3] It is sufficiently clear from the body of the notice that all of the defendants

[3] In *Meehan v. County of Los Angeles*, 856 F.2d 102, 105 (9th Cir. 1988), we considered the question whether a notice of appeal naming "Brian Meehan, et al" was sufficient to constitute an appeal on behalf of two unnamed defendants as well. We held that it was not. Our opinion does not indicate whether the quoted words appeared in the caption of the notice, the body, or both. What is clear, however, is that, unlike the case before us, there is no suggestion in the opinion that the names of the two other defendants appeared anywhere in the notice of appeal or that any generic term such as "defendants" or "the defendants" was used instead.

are seeking to appeal. While their intention might arguably have been clearer had the defendants used the article "the" in front of the word "defendants," the omission of the article does not require a different result from that reached by the Sixth Circuit. Defendants, in its normal usage, means all defendants not just some. Had only *some* defendants intended to appeal, the proper term to be used in the body of the notice would have been "certain defendants." Alternatively, if only some defendants desired to appeal, those defendants could have identified themselves individually. As stated by the Advisory Committee Notes on the 1979 amendment, "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." *Id.* at 870. As was the case in *Ford*, " 'the function of notice' was met as to each of the defendants' in this case," therefore, this court has jurisdiction over the appeal and over each of the defendants.[4]

The suggestion raised by appellees of want of jurisdiction and appropriateness of dismissal is hereby rejected.

[4] In *Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114, 1116 (1st Cir. 1989), the First Circuit held that it had jurisdiction over Acevedo-Ruiz's appeal since he was named in the caption of the notice of appeal. In its opinion, the court assumed that it lacked jurisdiction over Acevedo-Ruiz's wife and the conjugal partnership although the word "defendants" was used in the body of the notice. However, the court found it unnecessary to rule on that issue since it found jurisdiction over Acevedo-Ruiz's appeal sufficient for purposes of the proceedings before it, and since the wife and partnership were merely derivative rather than real defendants. To the extent that dictum in *Mariani-Giron* suggests that the use of the term "defendants" is insufficient to give notice that all defendants are appealing, we simply disagree.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Dec. 31, 1987
Entered Jan. 6, 1988]

I. INTRODUCTION

This case has been remanded by the United States Court of Appeals for the Ninth Circuit for further consideration in light of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603 (also known as the "Simpson-Rodino Act of 1986"), which was enacted after this Court entered summary judgment in favor of plaintiffs. The Court requested briefing from the parties on the effect of the IRCA on the inclusion by the Immigration and Naturalization Service ("INS") of a condition barring unauthorized employment in every appearance and delivery bond issued in connection with a deportation proceeding. After careful consideration of these briefs and the record in this case, the Court finds that the IRCA does not affect this Court's earlier ruling granting summary judgment in favor of plaintiffs.

Defendants contend that this Court's earlier ruling was incorrectly based on a misreading of the legislative history of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101 *et seq.*, in particular §§ 1252(a) and 1103(a), and on an unfounded conclusion that the unauthorized employment of aliens, or undocumented workers, was not one of the primary concerns of the United States immigration laws. Defendants further contend that the 1986 amendments to the Act (i.e., the IRCA) provide additional evidence of Congress' past and present concern with the impact of such employment on the American workforce.

The Court agrees with defendants that there are aspects of the Act concerned with the impact of the employment of undocumented workers on the American workforce and that the IRCA specifically deals with the issue of such employment by the implementation of employer sanctions. This, however, does not alter the Court's conclusion that the regulations in question in this case were promulgated beyond the statutory authority of the Attorney General, in that the Attorney General's discretion to condition release on bond pending deportation is properly limited to conditions that are related to obtaining an undocumented worker's appearance at future immigration proceedings and does not extend to the blanket imposition of a no-work condition on all undocumented workers who are released on bond pending future deportation proceedings. *See* March 5, 1985 Order.

II. THE IRCA

In 1986 Congress passed the IRCA. Broadly speaking, the IRCA is composed of two major parts. First, the IRCA provides for amnesty to certain undocumented workers. Second, the IRCA establishes a system of sanctions against employers who employ undocumented workers in violation of the provisions of the act. 8 U.S.C. § 1324A. The Court finds that the issue currently before it is a narrow one and can be stated as follows: whether a consideration of the IRCA changes this Court's ruling that the regulations as codified in 8 C.F.R. §§ 103.6(a)(2)(ii) and (iii) and 109.1(b)(8) were promulgated beyond the statutory authority of the Attorney General? Only the employer sanctions are relevant to this analysis.

In the Court's original order, filed March 5, 1985 and entered March 7, 1985, the Court fully considered defendants' argument that the mandatory inclusion of a condition barring unauthorized employment by undocumented workers in an appearance and delivery bond furthered the broad purpose of the Act to protect the United States domestic labor force. The Court examined in detail the legislative history of 8 U.S.C. § 1252(a), which gives the Attorney General the authority to prescribe bond conditions, in order to interpret the statutory language. The Court found that the scope of the Attorney General's discretion under § 1252(a) is not unlimited, as revealed by the section's legislative history and the history of its previous versions. Conditions that are within the Attorney General's discretion to impose are limited to those aimed at obtaining an undocumented worker's appearance at future immigration proceedings; no-work provisions do not serve this purpose.

Defendants renew their argument that the central purpose of the Act is the protection of the American labor force from competition and displacement due to illegal immigration. Defendants contend that the employer sanctions provisions of IRCA underscore this central purpose and erase any doubt that such concern is a peripheral one. Defendants, however, offer nothing further to demonstrate that the IRCA in any way broadens the specific examples of allowable conditions set out by Congress in the legislative history of § 1252(a). These allowable conditions relate solely to the ability of the INS to maintain contact with and control over undocumented workers on bond pending deportation proceedings.

In addition, defendants give no further justification for the use of a blanket no-work provision that is devoid of individualized determinations as to employment status. The availability of individualized determinations for those undocumented workers who apply to the district director for work authorization, who have claimed that they already have received such work authorization, or who have filed a bona fide application for asylum does not transform the blanket no-work provision into a system of individualized determinations. This Court has already analyzed these two questions in deatil and has distinguished *Carlson v. Landon*, 342 U.S. 524 (1952), in its March 5, 1985 Order and incorporates those portions of the earlier order in this order.

Defendants also cite to § 1103(a), which generally gives the Attorney General authority to administer and enforce the Act, as support for its argument that the Attorney General has wide discretion in promulgating regulations. Although § 1103(a) appears to give the Attorney General broad discretion in general relating to the Act's administration and enforce-

ment, § 1252(a) specifically deals with the Attorney General's discretion to impose bond conditions. Section 1252(a) places certain limits on the Attorney General's discretion within a specific context. The recognition of such limits is not inconsistent with a general principle of broad discretion that appears to be contained in § 1103(a).

The Court acknowledges that the dicta in *DeCanas v. Bica*, 424 U.S. 351, 360 n.9 (1976) prompts the question of whether the existence of employer sanctions elevates the employment of undocumented workers from a "peripheral concern" of the Act to the Act's primary concern, thereby making the no-work provision a proper exercise of the Attorney General's discretion. Although the enactment of employer sanctions makes this question a more difficult one, the Court is not prepared at this juncture to find that the passage of the IRCA gives the Attorney General unbridled discretion to impose bond conditions, such as the bond regulations at issue in this case. The Court notes as significant that the bond regulations are aimed at employees, whereas the sanctions in the IRCA target employers.

III. CONCLUSION

Based on the analysis above, the Court finds that the IRCA does not alter this Court's earlier ruling; therefore, the Court finds that summary judgment in favor of plaintiffs is warranted.

IT IS SO ORDERED.

DATED: December 31, 1987

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 85-6131

DC No. CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

vs.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
Hon. David V. Kenyon, District Judge, Presiding
Argued and submitted April 9, 1986 at
Pasadena, California

[Filed June 13, 1986]

OPINION

Before: HUG and NORRIS, Circuit Judges, and SOLOMON,* District Judge.

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

SOLOMON, Judge:

The Immigration and Naturalization Service (INS) appeals the district court's grant of summary judgment in favor of National Center for Immigrants' Rights, Inc. (NCIR), appellees. The district court held that the inclusion of a condition barring unauthorized employment in every appearance and delivery bond issued in connection with a deportation proceeding exceeded the Attorney General's statutory authority under the Immigration and Nationality Act (I & N Act or Act). We affirm.

Facts

The I & N Act[1] is a comprehensive scheme intended to govern all aspects of the admission of aliens to the United States. The Act provides for the arrest and deportation of aliens present in the United States in violation of the law. 8 U.S.C. § 1357(a)(2) (1982). An alien taken into custody pending a final determination of deportability may, in the discretion of the Attorney General, "(1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole." 8 U.S.C. § 1252(a).

Under this statutory authority, the INS promulgated the following regulations:

> (ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in

[1] 8 U.S.C. §§ 1101-1503.

> connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.
>
> (iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:
>
> (A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;
>
> (B) Prior immigration violations by the alien;
>
> (C) Whether there is a reasonable basis for considering discretionary relief; and
>
> (D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.[2]
>
> * * *
>
> Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.[3]

[2] 8 C.F.R. § 103.6(a)(2)(ii) and (iii) (1985).

[3] 8 C.F.R. § 109.1(b)(8) (1985).

Appellees[4] filed this action to challenge the implementation of the regulation on both statutory and constitutional grounds. The district court granted a preliminary injunction enjoining the enforcement of the regulations. This court affirmed. *National Center for Immigrants Rights, Inc. v. Immigration and Naturalization Service*, 743 F.2d 1365 (9th Cir. 1984).

On remand, the district court granted appellees' request for class certification. The class consists of "all those persons who have been or may in the future be denied the right to work pursuant to 8 C.F.R. § 103.6." The district court held that the regulations are invalid because they were promulgated beyond statutory authority and because they impose a blanket condition on all arrested aliens. The district court granted summary judgment in favor of appellees.

In this appeal, the INS contends that the language of the Act gives the Attorney General complete discretion to impose any release condition which furthers the provisions of the Act. In addition, the INS contends that the district court lacked jurisdiction over individuals in the class because: 1) appellees did not file a habeas corpus proceeding as required by the Act; and 2) certain individuals failed to exhaust their administrative remedies.

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[4] Appellees include thirteen nonprofit organizations providing free legal aid services to aliens with immigration problems, a local United Auto Workers affiliate, eleven named aliens held in detention, four named aliens released on bonds with conditions against unauthorized employment, and one unnamed alien who claims to be deterred from filing for benefits with the INS because of fears that the new regulations would result in that alien's indefinite detention.

Standard of Review

Appellate courts review *de novo* a trial court's grant of summary judgment. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). Summary judgment is appropriate when there are no genuine issues of material fact and when the evidence, viewed in a light most favorable to the opposing party, entitles the movant to prevail as a matter of law. *Id.* The court shall consider all admissible affidavits and supplemental documents on a motion for summary judgment. Fed. R. Civ. P. 56. Proper jurisdiction is a question of law and is also subject to *de novo* review. *See Clayton v. Republic Airlines, Inc.*, 716 F.2d 729, 730 (9th Cir. 1983).

Discussion

Jurisdiction of the District Court

In a class action, the court must have jurisdiction over the claims of the individual members of the class. *See Califano v. Yamasaki*, 442 U.S. 682, 701-702 (1979). The class certified must be limited to individuals who meet the requirements of the relevant jurisdictional statutes. *Id.*

Appellees assert that because the INS failed to raise its jurisdictional arguments at the trial level, the INS is precluded from raising them now. This assertion is without merit. A party may raise jurisdictional challenges at any time during the proceedings. *May Dept. Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980).

The INS contends that the district court lacked jurisdiction because NCIR failed to file the habeas

corpus action required under 8 U.S.C. § 1252.[5] We reject this contention because we have already determined that section 1252(a) is inapplicable to this case because the section deals only with complaints about delays in determining the deportability of individual aliens. *National Center*, *supra*, 743 F.2d at 1368.

The INS also contends that NCIR failed to exhaust the administrative remedies that the Act secures to detained aliens. The only exhaustion requirement of the Act[6] applies to "orders of deportation or of exclusion" and not to conditions imposed on bonds prior to such order. We hold that the district court had jurisdiction over the members of the certified class.

Review of Summary Judgment

Absent a clearly expressed legislative intent to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Consumer Product Safety*

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[5] 8 U.S.C. § 1252(a) provides in part that:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

[6] 8 U.S.C. § 1105a(c) (1982) provides in part that:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The INS asserts that the language of 8 U.S.C. § 1103 and § 1252(a) clearly grants authority to the Attorney General to impose any condition in a bond that he deems necessary to carry out the provisions of the Act. The Act contains a provision which conditions the entry of certain aliens into the United States on employment considerations. 8 U.S.C. § 1182 (a)(14). These limitations reflect Congress's desire to protect the American workforce from displacement due to immigration. The INS argues that the no-work condition is directly related to this purpose of the Act and is within the Attorney General's statutory authority.

The Attorney General may release an arrested alien pending a determination of deportability under a security bond "containing such conditions as the Attorney General may prescribe." 8 U.S.C. § 1252 (a). The express language of the statute appears to grant wide discretion to the Attorney General. Nevertheless, legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings.

Section 1252(a) deals solely with the arrest, custody and control of an alien pending determination of deportability. The specific examples of allowable conditions set out by Congress in the legislative history[7] relate solely to the ability of the Attorney General and the INS to maintain contact with and

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[7] H.R. Rep. No.1365, 82d Cong., 2d Sess. 6 (1952); H.R. Rep. No. 2980, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950).

control over aliens. These indicate a Congressional intent to limit the Attorney General's authority under section 1252(a) to the imposition of only those conditions which tend to insure an alien's appearance at future proceedings.

Relying on *Carlson v. Landon*, 342 U.S. 524 (1952), the INS asserts that the Attorney General's authority to impose bond conditions is not limited to these conditions. In our opinion, such reliance is misplaced. *Carlson* involved a challenge to the Attorney General's authority to hold five active Communists without bail pending the determination of their deportability. The Attorney General based his denial of bail primarily on the heightened Congressional interest in protecting the United States and its citizens from Communist activity, evidenced by the Internal Security Act of 1950,[8] and the Subversive Activities Control Act of 1950.[9] *Id.* at 529.

The Supreme Court examined the applicable deportation standards and found that the Attorney General did not have "untrammeled discretion" in determining bail. "[H]e must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543.

The Court examined the specific legislative scheme of the Internal Security Act of 1950 and found that the statute granted the Attorney General authority broad enough to justify the detention of the Communist aliens. *Id.* at 541. Although the court noted that the general consideration for denial of bail was to insure availability for trial, it found that the Communist threat to the national security was ex-

[8] 8 U.S.C. §§ 137 and 155.

[9] 50 U.S.C. §§ 781-826.

ceptional. The Court held that the Attorney General was within the scope of his authority when he denied bail to the Communist aliens.

The scope of discretionary authority granted to the Attorney General under the Internal Security Act is much greater than the authority granted him under the Act. This court previously noted in *National Center*, *supra*, 743 F.2d at 1370:

> In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "[t]he INA evinces 'at best evidence of peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, —— U.S. ——, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984) (quoting *DeCanas v. Bica*, 424 U.S. 351, 360, 96 S.Ct. 933, 939, 47 L.Ed.2d 43 (1976)).

In *DeCanas v. Bica*, 424 U.S. 351 (1976), the Supreme Court held that a California statute that prohibited the knowing employment of illegal aliens if such employment would adversely affect lawfully resident workers was not preempted by the Act. *Id.* at 365. Likewise, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court held that the application of the National Labor Relations Act to undocumented aliens was not prevented by the Act because the Act was only peripherally concerned with the employment of aliens.

In *Carlson*, *supra*, there was evidence that each individual, at the time of his arrest, was a member of the Communist Party and had participated in the Party's indoctrination of others. *Carlson*, *supra*, 342 U.S. at 530. This evidence of individual personal activity justified the Attorney General's discretion to deny bail. The *Carlson* court noted that not all de-

portable Communist aliens were automatically denied bail. This holding is in contrast with the regulations in this case which subject all arrested aliens to the no-work condition until the alien can prove "compelling reasons" for granting employment authorization.

The Attorney General, in his interpretation of his authority under the Act, has recognized the need for individualized determinations rather than the imposition of a blanket condition. *Matter of Toscano-Rivas, et al.*, 14 I & N Dec. 523 (1974). Earlier regulations and INS case law have required individualized determinations before the inclusion of a no-work condition in the bond. *See Matter of Chew*, I & N Dec. #2910 (July 1, 1982); and *Matter of Vea*, I & N Dec. #2890 (November 4, 1981).

The statutes, legislative history, and pertinent case law indicate that the Attorney General's authority under 8 U.S.C. § 1252(a) of the Act is limited to the imposition of bond conditions which tend to insure the alien's appearance at future deportation proceedings. The peripheral concern of the Act with the employment of illegal aliens is not sufficient to support the imposition of a no-employment condition in every bond.

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-7927-KN (JRx)

NATIONAL CENTER FOR IMMIGRANTS' RIGHT, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Mar. 5, 1985]

ORDER

In 1983, the Immigration and Naturalization Service ("INS") promulgated Regulations[1] ("the Regulations") which place a condition barring employment in an appearance and delivery bond in connection with deportation proceedings. The no-work condition operates as follows: When a person is arrested as a suspected illegal alien and is later released on bond pending a deportation proceeding, the suspect is barred from becoming employed. How-

[1] 8 C.F.R. §§ 103.6(a)(2)(ii), (iii) (1983); 109.1(b)(8) (1983).

ever, the suspect may obtain employment authorization from the INS District Director upon application establishing "compelling reasons" for granting employment.

This action, brought by Plaintiffs[2] on December 6, 1983, challenged the implementation of the Regulations on both statutory and constitutional grounds. On December 16, 1983, this Court granted a preliminary injunction enjoining the enforcement of the Regulations. The Court of Appeals upheld the preliminary injunction on September 28, 1984.

The INS then brought this Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56(b), on the grounds that there is no genuine issue as to any material fact and that the INS is entitled to judgment as a matter of law. The Court finds that no genuine issue of material fact exists and that summary adjudication is appropriate. The Court further finds that the Regulations at issue are invalid because they were promulgated beyond statutory authority. Therefore, the Court grants Summary Judgment for the Plaintiffs, National Center for Immigrants' Rights, *et al.*, based upon its First Cause of Action.

This Court's grant of Summary Judgment for the Plaintiffs, as nonmoving parties, is consistent with prior case law. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1982). Even though Plaintiffs

[2] Plaintiffs include thirteen nonprofit organizations providing free legal aid services to aliens with immigration problems, a local United Auto Workers affiliate, eleven named aliens held in detention, four named aliens released on bonds with conditions against unauthorized employment and one unnamed alien who claims to be deterred from filing for benefits with the INS because of fears that the new regulations would result in that alien's indefinite detention.

have made no formal cross-motion under Fed. R. Civ. P. 56, summary judgment is appropriate in this case because the INS has had an adequate opportunity to show that there is a genuine issue of fact and that their opponent is not entitled to judgment as a matter of law. Moreover, this is "in keeping with the objective of Rule 56 to expedite the disposition of cases and . . . with the mandate of Rule 54(c) requiring the court to grant relief to which a party is entitled 'even if the party has not demanded such relief in his pleadings.'" Wright & Miller, *Federal Practice and Procedure*, § 2720 (1983).

The Plaintiffs have asserted six Causes of Action in the instant case:

1. The Regulations at issue are invalid due to the fact that they were promulgated without statutory authority;
2. The INS Commissioner lacks statutory authority to promulgate the Regulations because they remove matters from the jurisdiction of immigration judges;
3. The Regulations violate the Fifth Amendment's Due Process Clause because it impinges on an important liberty interest without the opportunity for notice, hearing and due process proceeding of record;
4. The Regulations violate the Fifth Amendment's Equal Protection guarantee due to the adverse effect on indigent people;
5. The Regulations are inconsistent with and superseded by other federal legislation;
6. The INS has failed to establish uniform procedures to implement "work authorization"

policies and thereby violates Fifth Amendment guarantees of procedural and substantive due process.

The Court bases its ruling on the First Cause of Action and finds as a matter of law that the Regulations at issue were promulgated without statutory authority and are therefore invalid. Further, since the Court grants summary judgment on the Plaintiffs' First Cause of Action, consideration of the remaining five Causes of Action is unnecessary.

The Regulations state in relevant part:

§ 103.6 Surety bonds.

(a) . . . .

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

§ 109.1 Classes of Aliens eligible.

. . . .

(b) . . . .

(8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.[3]

. . . .

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

8 C.F.R. §§ 103.6, 109.1 (1984).

The Court finds that two crucial issues are presented by this case. The first consists of whether the Attorney General can impose release conditions which are unrelated to securing the alien's presence at future deportation proceedings, yet which further the broad purposes of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* The second issue involves the discretion of the Attorney General to impose a blanket condition which inherently precludes any individualized determination.

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[3] § 103.6(a)(2)(iii) provides factors to be considered for a grant of employment authorization:

Factors to be considered. Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

I. *Can the Attorney General impose release conditions based on § 1252(a) which further a broad purpose of the Immigration and Nationality Act, but which are unrelated to securing the alien's presence at future deportation proceedings?*

The INS claims that the Attorney General's authority to condition an alien's release with a no-work provision pending deportation proceedings is well within his discretionary powers to carry out the broad purposes of the Immigration and Nationality Act ("INA"). Citing the protection of the U.S. domestic labor force as the broad purpose of the INA, the INS asserts that the no-work condition is reasonably related to this legitimate government interest. The INS bases its argument on the language, legislative history, and judicial and administrative interpretations of 8 U.S.C. 1252(a).

That section states:

> Pending a determination of deportability in the case of any alien . . ., such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, *containing such conditions as the Attorney General may prescribe;* or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody and

> detained until final determination of his deportability.

8 U.S.C. § 1252(a) (emphasis added).

Although § 1252(a) appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond, this discretion must be interpreted in light of a previous version of § 1252(a) as contained in § 242 of the Immigration and Nationality Act and its legislative history. This previous version read in part:

> . . . such alien may, in the discretion of the Attorney General, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. *It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself when required to do so for the purpose of defending himself againt the charge or charges under which he was taken into custody . . . .*

Pub. L. 831, 81st Cong., 1st Sess. § 23, reprinted in 1950 U.S. Code Serv. 1006 (emphasis added).

The accompanying legislative history of the previous version of § 1252(a) stated:

> These provisions, of course, enumerate only one of the conditions which is mandatory in the bond or as a parole condition. *This bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit to include. Thus, a man released on bond might*

> *have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information.* Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or less amount or other conditions shall be furnished. This bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien . . . .

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added). The applicability of this legislative history is underscored by H.R. Rep. No. 1365, 82d Cong., 2d Sess., 57, reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1711, which indicates that when Congress enacted § 1252(a) in its present form in 1952, that "this provision, in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950." *Id.* Therefore, the scope of discretionary authority given to the Attorney General under the previous version also governs the scope of the discretionary authority provided here. Thus, the scope of discretionary authority of the Attorney General remains unchanged under § 1252(a).

The Court finds that the aforementioned statutory language, as shown by its legislative history, reveals that the Attorney General's discretion to condition release on bond pending deportation is properly limited to conditions which are related to obtaining an alien's

appearance at future proceedings. This finding is buttressed by the specific examples in the 1949 and 1950 legislative history of the previous version of § 1252(a), as well as a November 7, 1983 rulemaking proceeding for the Regulations at issue.

At the rulemaking proceeding, as reflected by 48 Fed. Reg. 51142 (November 7, 1983),

> Many commentators contended that the no-work condition is contrary to the purpose of the appearance bond, which is to assure the appearance of the alien at a deportation or exclusion hearing. Most commentators who focused on this issue asserted that assuring appearance was the *only* purpose of the bond.

The INS asserted after this proceeding that:

> While it is true that most bond conditions are aimed at ensuring appearance of an alien there does not appear to be any reason under Section 242 of the Act to limit conditions of release.

Id. The INS relied on the Attorney General's broad interpretation of his authority in this matter in *Matter of Toscano-Rivas*, 14 I. & N. Dec. 550, 555 (A.G. 1974), in support of this proposition. This Court does not find *Toscano* persuasive, especially in light of the ambivalent language which permeates that case. For instance, the Attorney General states that "the pertinent statutory provisions authorize, *in at least some* circumstances, the inclusion in appearance-and-delivery bonds of conditions which bar unauthorized employment." *Id.* at 553 (emphasis added). In addition, the Attorney General proclaims that "it *may* be proper to impose [such bond conditions] upon aliens who become subject to deportation proceedings." *Id.* at 555 (emphasis added). Such

language is a far cry from a persuasive, well-documented argument.

The INS's reliance on *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952), in asserting that the Attorney General may condition release on the basis of protecting the public interest (i.e. American Labor) is misplaced.

Carlson involved a challenge to the Attorney General's power to hold five active Communists without bail pending the determination of their deportability. The Supreme Court examined the applicable deportation standards and found that in carrying out the policies and standards as to what aliens are subject to deportation, "the Attorney General is not left with untrammeled discretion as to bail . . . . He must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." 342 U.S. 524, 543.

The *Carlson* Court examined the specific legislative scheme of Title I, § 2 of the Internal Security Act of 1950 and found that the statute granted the Attorney General discretion broad enough to justify his detention of the Communists. *Id.* at 541. The statute provides in relevant part:

> The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each

> State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Internal Security Act, Title I, § 2 (15) (1950). Based on its examination of the legislative scheme, the *Carlson* Court found that this provision was,

> designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain non-citizens, including members of the Communist Party.

342 U.S. 544. Although the Court addressed the issue of securing the aliens' presence at future deportation proceedings, it found that the Communist threat to the national security was controlling: ". . . [W]e also take into consideration the factor of probable availability for trial, which we do not think is of great significance in cases involving security from Communist activities of alien Communists . . . ." *Id.* at 541 n.35.

The broad scope of discretionary power granted to the Attorney General by § 2 of the Internal Security Act is distinguishable from his power to impose bond conditions under the INA. As the Court of Appeals noted in *National Center for Immigrants' Rights, et al. v. Immigration and Naturalization Service, et al.*, —— F.2d —— (9th Cir., 84-5504, Sept. 20, 1984) (slip opinion at 9):

> In contrast to Congress' clear directives under the Internal Security Act in the area of national

> security, "the INA evinces 'at best evidence of peripheral concern with the employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2809 (1984) (quoting *De Canas v. Bica*, 424 U.S. 351, 361 (1976)).

Furthermore, Supreme Court cases have demonstrated that *Carlson* is not applicable to this case. *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803 (1984) and *De Canas v. Bica*, 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed. 43 (1976) cast doubt on the INS' assertion that the legislative scheme of the INA justifies the Attorney General's exercise of discretion to impose no-work conditions on release. The *De Canas* Court stated:

> The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as "plainly within . . . (that) central aim of federal regulation."

424 U.S. 351, 359 (emphasis added). *See also Sure-Tan, Inc.*, 104 S. Ct. 2803, 2809.

In light of *De Canas*, the INA cannot serve as the "legislative scheme" which authorizes the Attorney General, based upon the purpose of the protection of the domestic labor market, to impose no-work restrictions in appearance and delivery bonds. Therefore, this Court finds that the Attorney General's discretion to impose release conditions must be limited to those conditions which are related to securing the alien's presence at future deportation proceedings.

II. *Can the Attorney General impose a blanket no-work condition on all illegal aliens who are released on bond pending deportation proceedings?*

The INS asserts that it is within the Attorney General's authority to impose an employment prohibition on *all* release bonds as per § 1252(a). Thus, they argue that a blanket condition should apply, rather than a condition based upon individualized determinations.

Carlson does not lend credence to such an argument, and can be further distinguished from the instant case. In *Carlson*, there was evidence as to *each* individual,

> indicating that he was at the time of arrest a member of the Communist Party of the United States . . . and had participated . . . in the Party's indoctrination of others to the prejudice of the public interest.

342 U.S. 530. This evidence of membership and personal activity in the Communist Party for each alien justified the exercise of the Attorney General's discretion to deny bail. *Id.* at 541.

Moreover, the *Carlson* Court found that not all deportable aliens were denied bail under the 1950 Internal Security Act. *Id.* at 541-42. This should be contrasted with the INS Regulations which subject all arrested aliens to the no-work condition on bail unless the alien can overcome the heavy burden of proving "compelling reasons" for granting employment authorization.

This Court agrees with Justice Frankfurter's dissent in *Carlson* which states that the Attorney General's discretion to impose a condition based on an individualized determination is different from his authority to do so by means of a blanket rule:

> If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an undiscriminating, unindividualized class determination—it would disregard the clear direction of Congress for this Court not to hold that the Attorney General had exceeded the limits of his discretion.

Id. at 558. It should be noted that this aspect of Justice Frankfurter's dissenting opinion is in consonance with the majority decision in *Carlson*, which was based upon evidence as to *each* individual.

Several other judicial and administrative interpretations have upheld the principle that the "factors relevant to the exercise of discretion are factors that pertain to each individual as an individual." *Id.* at 562. *See Rubinstein v. Brownell*, 206 F.2d 449, 455-56 (D.C. Cir. 1953) (detention of alien seeking judicial review of deportation order was improper when Attorney General made no showing that the alien would abscond or engage in subversive or criminal activity), *aff'd per curiam by an equally divided court*, 346 U.S. 929 (1954); *O'Rourke v. Warden*, 539 F. Supp. 1131, 1137 (S.D.N.Y. 1982) (court should review Board of Immigration Appeals' decision to deny bail to determine whether it has a reasonable foundation in the record); *Matter of Patel*, 15 I. & N. Dec. 2491 (an alien should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk).

In addition, under the prior regulation, the INS required individualized determinations in each case

of the propriety of attaching a no-work condition to a bond. While the INS has the authority "in a *proper* case to impose a bond condition prohibiting unauthorized employment,"[4] it was not permittited in *Matter of Vea*, 15 I. & N. Dec. 2890 (BIA 1981). However, such a condition was upheld in *Matter of Chew*, 15 I. & N. Dec. 2910 (BIA 1982), based on a finding that it was "appropriate in this case." *Id.* at p. 265.

Therefore, this Court finds that the discretion of the Attorney General does not extend to the blanket imposition of a no-work condition on all aliens who are released on bond pending future deportation proceedings.

For the reasons discussed above, this Court finds that the Regulations have been promulgated beyond the statutory authority of the Attorney General and are therefore invalid. Accordingly, Summary Judgment is granted to the Plaintiffs.

Plaintiffs are asked to prepare proposed findings of fact and conclusions of law by March 15, 1985.

DATED: March 5, 1985

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

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[4] *Matter of Vea*, 15 I. & N. Dec. 2890, p. 174.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5504

D.C. No. CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding
Argued and Submitted June 8, 1984

[Filed Sept. 28, 1984]

OPINION

Before: WRIGHT, FERGUSON and REINHARDT, Circuit Judges.

FERGUSON, Circuit Judge:

The Immigration and Naturalization Service (INS) appeals the district court's grant of a preliminary injunction restraining the INS from applying a new regulation which became effective December 7, 1983.

The previous INS regulations provided that in his discretion the District Director, with the prior approval of the INS Regional Commissioner, could include a condition barring unauthorized employment in an appearance and delivery bond in connection with deportation proceedings. 8 C.F.R. § 103.6(a)(2)(ii) (1983). In the regulation now being challenged, the INS does away with individualized determinations. The new regulation provides in part that "[a] condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding. . . . Only those aliens who upon application . . . establish compelling reasons for granting employment authorization may be authorized to accept employment." 8 C.F.R. §§ 103.6(a)(2)(ii)-(iii), 109.1(b)(8) (1984).[1]

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[1] The new regulation states:

§ 103.6 Surety bonds.

(a) . . . .

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

On December 6, 1983, the plaintiffs brought suit to block implementation of the new regulation. The plaintiffs (referred to collectively as NCIR) include a number of nonprofit organizations which provide legal services to aliens with immigration problems and whose members and clients would be affected by the regulation, a United Auto Workers Union local affiliate, and 16 individuals currently in deportation proceedings. NCIR challenges the validity of the regulation under several different theories—that the regulation is without statutory authority, that it is not reasonably related to the purpose of assuring a detainee's appearance at future deportation proceedings, that it was promulgated unlawfully, that it violates fifth amendment due process and equal protec-

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(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

§ 109.1 Classes of aliens eligible.

. . . .

(b) . . . .

(8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6 (a) (2) (iii) of this chapter.

. . . .

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

Title 8, Code of Federal Regulations.

tion guarantees, and that it is inconsistent with and superseded by other federal laws.

On December 8, 1983, following a hearing, the district court denied a temporary restraining order and scheduled a hearing on NCIR's motion for a preliminary injunction. After hearing evidence and testimony on December 16, 1983, the court granted an injunction against enforcement of the regulation. Addressing only two of NCIR's theories, the court concluded that NCIR has a fair chance of showing that the regulation is invalid because it is inconsistent with the statute and because it violates due process guarantees. The district court further found that the harm to the plaintiffs from application of the regulation would be irreparable. It noted that individuals subjected to the no-work condition will be unable to support themselves and their dependents pending their deportation hearings and will have more difficulty obtaining bonds and counsel. The court found that this harm clearly outweighed the government's harm from delay in implementing the regulation.

DISCUSSION

Jurisdiction of the District Court

The INS raises a two-pronged threshold attack on the district court's jurisdiction. First, the INS asserts that judicial review is available only through the habeas corpus provisions of 8 U.S.C. § 1252(a). Second, the INS argues that this case is not ripe for adjudication.

The INS characterizes NCIR's challenge to the regulation as involving determinations concerning release on bond and thus as encompassed within the

habeas corpus provision of section 1252(a), which states in part:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

Precisely drawn statutory procedures, such as this habeas corpus procedure, are generally held to preempt more general grants of jurisdiction in cases to which they apply. *See, e.g., Brown v. GSA*, 425 U.S. 820, 834 (1976). The INS states that the legislative history shows Congress' intent to make section 1252 (a) an exclusive remedy:

> An alien arrested and taken into custody may, pending the final determination of deportability, be continued in custody, released on bond or released on conditional parole, and the determination of the Attorney General concerning such detention, release on bond or parole shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch to determine deportability.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1711-12 (emphasis added). Since this suit was not brought as a habeas corpus action pursuant to section 1252

(a), the INS argues that the district court lacked jurisdiction.

However, we conclude that section 1252(a) is inapplicable to this case. Section 1252(a) deals only with complaints about delays in determining deportability in individual cases. In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982), *disapproved on other grounds, Jean v. Nelson*, 727 F.2d 957, 976 n.27 (11th Cir. 1984) (en banc), the court drew a distinction between jurisdiction to rule on the merits of an individual deportation order and jurisdiction to rule on a pattern and practice of constitutional violations. The court held that although 8 U.S.C. § 1105(a) gave courts of appeals exclusive jurisdiction to review alleged procedural irregularities in an individual deportation hearing, an allegedly unlawful pattern, program, or scheme of immigration officials was subject to examination by the district court under federal question jurisdiction. *Id.* at 1033. Here, the NCIR challenges the imposition of an automatic employment prohibition in all release bonds on statutory and constitutional grounds. In its prayer for relief, NCIR does not seek a review on the merits of any individual determination by the INS regarding release on bond. *See id.* at 1033 n.23. Thus, the district court properly has jurisdiction under 28 U.S.C. § 1331 to examine the merits of NCIR's challenges and to enter declaratory and injunctive relief. The district court is also given jurisdiction over claims arising under the immigration statutes. 8 U.S.C. § 1329.

The INS also asserts that this challenge to the regulation is not ripe, arguing that because one of NCIR's major contentions is that the procedures used in applying the regulation are inadequate, the court

should await a more concrete case which may throw more light on the statutory and practical justifications for the regulation. *See, e.g., Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967).

The relevant considerations in determining whether a challenge to administrative action is ripe are (1) whether the issues are fit for judicial determination, and (2) the hardship to the parties from withholding consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The district court found that both considerations warranted present judicial review. The issues are "fit" for decision because the regulation is presently being enforced and is unquestionably final, because nothing in the Act precludes present review, and because the issues presented do not require further factual development by the administrative process. *See id.* More important, the district court found that the individual plaintiffs were suffering a significant and immediate hardship from the regulation. The court correctly concluded that the issue was ripe.

Standard of Review

We reverse an order issuing or denying a preliminary injunction only if the district court abused its discretion or based its decision in its preliminary review of the merits on erroneous legal principles. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

To obtain a preliminary injunction, the moving party must demonstrate either (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships sharply favors the moving party.

Beltran v. Myers, 677 F.2d 1317, 1320 (9th Cir. 1982). These are not separate tests, but are the ends of a continuum; the greater the relative hardship to the moving party, the less probability of success must be shown. *Benda v. Grand Lodge of the International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

When, as here, the plaintiffs have shown that the balance of hardships sharply favors their side, the district court need only conclude that the plaintiffs have raised "serious questions" to justify the grant of a preliminary injunction. *Beltran*, 677 F.2d at 1320. The INS does not challenge the court's finding that the balance of hardship clearly favors the plaintiffs. The hardship from being unable to work to support themselves and their dependents, to obtain release bonds, and to pay for legal representation is beyond question.

The INS requests that this court decide the merits of the case because the validity of the regulation is a question of law reviewable de novo. We decline to do so. The only conclusion of law entered by the district court is that NCIR has a fair chance of prevailing on the merits on two of its arguments. The parties have not had the benefit either of a full opportunity to present their cases or of a final judicial decision on the merits of the controversy. *See University of Texas v. Camenisch*, 451 U.S. 390, 396 (1981). This court thus limits its review of the merits to determining whether the district court abused its discretion by concluding that NCIR had a fair chance of success. *See, e.g., Sports Form, Inc. v. UPI*, 686 F.2d 750, 752 (9th Cir. 1992). *See also Otero Savings & Loan Association v. Federal Reserve Bank of Kansas City*, 665 F.2d 275, 277 (10th Cir.

1981) (review on merits is limited to extraordinary cases in which trial court has ruled on a motion for preliminary injunction based on a final interpretation of the law as applied to undisputed facts).

Is the Regulation in Accordance with the Immigration and Nationality Act?

The district court found merit in NCIR's argument that a condition of release must be related to securing the detainee's presence at future deportation proceedings. *See, e.g., Matter of Patel*, 15 I&N Dec. 666 (BIA 1976). Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252(a), authorizes the Attorney General to set conditions for release on bond:

> Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. And such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. . . .

The INS asserts that this Act gives the Attorney General "untrammeled" authority to impose any release conditions reasonably related to the purposes of the Act, and that a major purpose of the Act is to protect the American labor force by precluding aliens from engaging in unauthorized employment. The INS relies on 8 U.S.C. §§ 1101(a)(15), 1182(a)(14) for this proposition. Thus, the INS argues, prohibiting employment pending deportation hearing is consistent with the overall legislative scheme.

To support this argument, the INS relies primarily on *Carlson v. Landon*, 342 U.S. 524 (1952). *Carlson* involved a challenge to the Attorney General's decision to hold five active alien Communists without bail pending determination of their deportability. *Carlson* does not conclusively control this case for two reasons. First, in *Carlson*, the Attorney General justified the exercise of his discretion to deny bail "by reference to the legislative scheme to eradicate the evils of Communist activity." *Carlson*, 342 U.S. at 543. The Supreme Court stated that "[a]s the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the Internal Security Act itself, Title I, § 2, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all these parties without bail as a menace to the public interest." *Carlson*, 342 U.S. at 541. In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "[t]he INA evinces 'at best evidence of peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2809 (1984) (quoting *De Canas v. Bica*, 424 U.S. 351, 360 (1976)). Congress has not made it a criminal offense for an alien to accept employment after entering this country without proper authorization. *Sure-Tan*, 104 S. Ct. at 2809.

Second, in *Carlson*, there was evidence as to each of the aliens of "membership plus personal activity in supporting and extending the Party's philosophy concerning violence" which justified the exercise of the Attorney General's discretion to deny bail. *Carlson*,

342 U.S. at 541. The Court noted that not all persons arrested as deportable under the Internal Security Act are denied bail. *Id.* at 541-42. The discretion of the Attorney General to impose a condition on a particularized showing in an individual case is quite different from the authority to do so by a blanket rule. As Justice Frankfurther observed:

> If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an undiscriminating, unindividualized class determination—it would disregard the clear directive of Congress for this Court not to hold that the Attorney General had exceeded the limits of discretion.

Id. at 558 (Frankfurter, J., dissenting). Cf. *Rubinstein v. Brownell*, 206 F.2d 449, 455-56 (D.C. Cir. 1953) (detention of alien seeking judicial review of deportation order was improper when Attorney General made no showing that the alien would abscond or engage in subversive or criminal activity), *aff'd per curiam by an equally divided court*, 346 U.S. 929 (1954). *See also O'Rourke v. Warden*, 539 F. Supp. 1131, 1137 (S.D.N.Y. 1982) (court should review whether agency's decision to deny bail is supported by or has reasonable foundation in the record). In conformity with these authorities, under the prior regulation the INS required specific, individualized information to justify an employment prohibition condition in each case. *Matter of Vea*, Interim Decision #2890 at 5 (BIA 1981); *Matter of Leon-Perez*, 15 I&N Dec. 239 (BIA 1975); 8 C.F.R. § 103.6(a)(2) (1983).

In addition to arguing that the Attorney General's discretion does not extend to imposing a blanket condition such as this one, NCIR argues that the nonemployment condition is not rationally related to the statutory purpose of protecting domestic labor. At the preliminary injunction hearing, NCIR introduced expert testimony and evidence tending to show that employment by aliens awaiting deportation proceedings does not affect American unemployment. The district court has not yet made any findings or conclusions based on that evidence.

We decline to discuss the other arguments advanced by the INS because we agree with the district court that NCIR has a fair chance of prevailing on the merits of its argument that the regulation is invalid because it is not related to the purposes of the Act and does not require individualized determinations.[2] Under the law of this circuit, NCIR was thus entitled to a preliminary injunction. *Los Angeles Memorial Coliseum Commission*, 634 F.2d at 1200.

Necessity for Class Certification

NCIR framed its complaint as a class action suit, but did not move for class certification prior to the preliminary injunction. The district court enjoined

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[2] The NCIR also contends that detained aliens have a protected liberty interest under the fifth amendment in working until their deportability is determined in a due process hearing. In addition, plaintiffs argue that the regulation violates their due process rights under the fifth amendment because it lacks procedures by which an alien may obtain employment authorization. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Although we need not decide these questions here, we agree with the district court that plaintiffs' arguments have some merit.

the INS from applying the regulation without making any findings as to class membership.

The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree. *See, e.g., Hollon v. Mathis Independent School District*, 491 F.2d 92 (5th Cir. 1974) (when suit was brought by individual challenging school regulations, a preliminary injunction enjoining enforcement of the regulation against anyone else went further than necessary to serve the purpose of maintaining the parties' status quo pending trial on the merits); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper"); *Tape Head Co. v. RCA*, 452 F.2d 816, 819 (10th Cir. 1971).

We therefore remand for possible modification of the injunction because on the basis of the present record its scope is too broad. On remand, if the district court fails to certify a class of plaintiffs, it must limit the injunction to apply to the named plaintiffs only.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. Cv. 83-7927 Kn (JRx)

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Dec. 16, 1983]

ORDER RE: PRELIMINARY INJUNCTION

The Court, having heard argument from counsel on December 16, 1983, with respect to plaintiffs' Motion for Preliminary Injunction, and having considered the points and authorities and declarations filed therewith,

IT IS HEREBY ORDERED that plaintiffs' motion is granted.

Initially, the Court must determine the jurisdictional issues of ripeness and standing. Also, prior to reaching a decision on the merits of the preliminary injunction, the Court must decide whether, in its

discretion, plaintiffs should be required to exhaust their administrative remedies before coming to this Court for a judicial determination.

I. *RIPENESS*

In determining whether an issue is ripe for judicial decision the Supreme Court has articulated two relevant considerations: (1) whether the issues are fit for judicial decision and (2) what will be the hardship to the parties if this Court were to withhold its consideration. *Abbott Laboratories* v. *Gardener*, 387 U.S. 136, 149 (1976); *Pacific Gas and Electric* v. *State Energy Res. Conservation*, ——U.S. —— 103 S.Ct. 1713, 1720 (1983). This Court finds that both of these considerations warrant the assertion of jurisdiction at the present time.

Four attributes of the issues in this litigation necessitate the conclusion that these issues are as fit for judicial decision as were the issues in *Abbott Laboratories*. First, in *Abbott* the regulation had not yet been enforced, although the Court still found the agency action to be "final" for purposes of review under the Administrative Procedure Act. In this action, because the regulation is presently being enforced, no question exists as to its finality. Second, similar to the Food, Drug, and Cosmetic Act underlying the *Abbott Laboratories* action, this Court does not find that the Immigration and Nationality Act precludes review of this no-work bond condition at this time. The exhaustion of administrative remedies requirement provided for in § 106(c) only applies to "an order of deportation or of exclusion", not to the conditions of a bond that would be imposed prior to such an order. 8 U.S.C. § 1105a(c). Third, issues presented in this action do not require

further factual development by the administrative process and will be dispositive of plaintiffs' claim.

As to the second *Abbott* consideration, it is clear that the impact on the plaintiffs or their members is "significant and immediate". *Kerr-McGee Chemical Corp.* v. *U.S. Dept. of the Interior*, 709 F.2d 597, 600 (9th Cir. 1983). At a minimum, individuals subjected to the no-work condition will be unable to work and support themselves until the District Director or Immigration Judge determines that they may do so. Further, the potential impact on these individuals also includes more difficulty in obtaining bonds and counsel as well as significantly affecting those dependent upon the alleged illegal alien. Beginning on December 7, 1983, these hardships were being felt. Certainly this hardship to the parties if judicial consideration was withheld at the present time, coupled with the fitness of the issues for judicial decision, compels the Court to conclude that the case is ripe for judicial determination.

II. *STANDING*

Each association has standing to bring this action on behalf of its members if:

(a) its members would otherwise have standing to sue in their own rights;

(b) the interests it seeks to protect are germane to the organization's purpose; and

(c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977). The plaintiff associations have demonstrated that each of these elements is present. First, they have established that their

"members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Members of the plaintiff organizations have been, are continuing to be, and will in the future be subject to this no-work bond condition. Even though this bond condition may be removed on a case-by-case basis, until it is removed, the individual is suffering immediate injury. Second, there has been no argument presented by the defendant that the interests these organizations are seeking to protect are not germane to the organizations' purposes. To the contrary, it appears to this Court that such interests are germane to these purposes. Third, plaintiffs are only seeking injunctive and declaratory relief. Where plaintiffs are only seeking such prospective relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth* v. *Seldin*, 422 U.S. at 515. Hence, this Court does not need the participation of individual members to provide the relief requested.

As to the individual plaintiffs, the Court finds that they are also confronted with immediate or threatened injury and therefore have standing to bring this action. They have either been subject to this no-work condition as a part of their release on bond or they are threatened with the immediate injury already described.

III. *EXHAUSTION OF ADMINISTRATIVE REMEDIES*

As noted above, there is no statutory provision requiring plaintiffs to exhaust administrative remedies

before seeking judicial determination. Therefore, whether plaintiffs should be required to exhaust administrative remedies is left to the sound discretion of this Court. *Kale* v. *United States*, 489 F.2d 449, 454 (9th Cir. 1973). In exercising this discretion, the Ninth Circuit has instructed the Court to balance "the interests of the agency in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances." *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978).

In the context of the pending action, this balance clearly favors the plaintiffs. It is clear that the administrative decisionmakers will not be able to decide the constitutional questions raised by plaintiffs. More importantly, the determinative statutory and constitutional issues that comprise this action neither depend upon the expertise of the agency nor require the making of a further administrative record. Perhaps of paramount importance, the very harm that this Court seeks to prevent is the continuation of administrative proceedings while the private party to the proceedings is not allowed to work. In this situation, the immediate redress for the plaintiffs plainly outweighs any agency interest that could be asserted.

IV. *PRELIMINARY INJUNCTION*

The grant or denial of a preliminary injunction rests in the discretion of the trial court. *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940); *County of Santa Barbara* v. *Hickel*, 426 F.2d 164 (9th Cir. 1970). Since a preliminary injunction is

an extraordinary remedy, it should not be granted unless the moving party, by a clear showing, carries the burden of persuasion. *Sierra Club* v. *Hickel*, 433 F.2d 24 (9th Cir. 1970), *aff'd.*, 405 U.S. 727 (1972).

There are two tests in the Ninth Circuit which are used to determine whether a preliminary injunction should issue. The first test requires the court to look at the following factors:

(1) whether the moving party will suffer irreparable injury if injunctive relief is not granted;

(2) the probability of success on the merits;

(3) whether, in balancing the equities, the non-moving party is harmed more by the injunction than the moving party is helped; and

(4) whether granting the injunction is in the public interest.

Sierra Club v. *Hickel*, *supra*, at 33.

The second test, developed in the Second Circuit and adopted in the Ninth Circuit as an alternative test, requires the moving party to meet the burden of demonstrating *either*:

(1) a combination of probable success and the possibility of irreparable injury, *or*

(2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor.

Charlie's Girls, Inc. v. *Revlon, Inc.*, 483 F.2d 953 (2d Cir. 1973); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

Under the alternative test, it is not necessary that the moving party be reasonably certain to succeed on the merits. If the harm that may occur to the moving party is sufficiently serious, it is only necessary that there be a fair chance of success on the merits. *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *Costandi* v. *AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941 (9th Cir. 1972).

In considering the showing which plaintiffs must make in order for this Court to grant a preliminary injunction, the Court focuses on two of plaintiffs' arguments: (1) whether the no-work condition of the bond must be relevant to the purpose of securing the appearance of the alien at the deportation hearing and (2) whether the contested regulations deprive aliens of their due process rights under the Fifth Amendment because they are automatically denied the right to work.

The Court believes that plaintiffs have a fair chance of succeeding on their argument that the no-work condition is not in accordance with statutory intent and constitutional requirements. The Court finds merit in the argument that any conditions imposed on the bond must be relevant to the purpose of securing the appearance of the alien at his deportation proceeding. *Matter of Patel*, Interim Decision No. 2491 (1976).

As to the second argument, the due process claim, the Court finds that plaintiffs have a fair chance of success on the merits. In order to show a deprivation of due process, plaintiffs must show that (1) they had a "liberty" or "property" interest and (2) that it was deprived without due process of law.

It is undisputed that the right to work is a "liberty interest." *Greene* v. *McElroy*, 360 U.S. 474,

492 (1952). Defendants contend that detained individuals do not have this right to work because of their status as illegal aliens. However, this argument assumes the very fact which the government has the burden of proving and has not yet done so. *Woodby* v. *INS*, 385 U.S. 276, 286 (1966). The Court believes that plaintiffs have a fair chance of showing at trial that the detained individuals are entitled to this right until the government proves their illegal status.

Under the contested regulations, plaintiffs are automatically denied this right to work as a condition of posting bond. The individual may obtain work authorization upon a showing of "compelling reasons" to the District Director, 8 C.F.R. § 103.6(a)(2)(iii), or through a bond reduction hearing before the Immigration Judge. In determining whether the regulations comport with due process, the Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), sets forth the following three factors to consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards: and (3) the government's interest.

The private interest at stake is the prohibition against employment pending deportation or a decision by the District Director or an Immigration Judge allowing the individual to work. In terms of the risk of erroneous deprivation, the Court observes that *all* aliens who post bond are automatically subjected to the no-work condition. Evidence presented indicates that the delay between the earliest time the detainee could be released and a review of the bond

condition by the Immigration Judge varies from a few hours to several weeks, largely depending upon the location of the hearing. While the evidence shows that a review by a District Director is generally obtainable on much shorter notice, the evidence at this point clearly indicates that this review is not designed to comport with due process requirements. Also, plaintiffs have raised serious questions as to the procedural sufficiency of the bond reduction hearings before the Immigration Judge. Based on these findings, the Court believes that a significant risk of erroneous deprivation prior to a due process hearing may exist. Finally, the government asserts that the interest at stake is the protection of the American labor force. While this Court need not determine at this time whether the government interest outweighs the private interest, or vice versa, the Court concludes that plaintiffs have at least a fair chance of proving at trial that the *Mathews* v. *Eldridge* factors weigh in their favor.

With respect to the injury element of the preliminary injunction standards, there is sufficient evidence of the possibility that the regulations will impose irreparable harm to those who fall within the purview of the no-work condition. The Court has made note of some of the kinds of harm that will arise from the contested regulations in its analysis of the ripeness issue above. Balancing this harm with the harm to the government, the Court recognizes the vital importance of protecting the American labor force. However, the Court notes that this problem has existed for several decades. In terms of the time between the issuance of this preliminary injunction and the trial, the Court believes that the immediate hardship to the plaintiffs clearly outweighs the hard-

ships to the government caused by a reasonable delay in the implementation of these regulations: The Court therefore finds that plaintiffs have satisfied the requirements for the issuance of a preliminary injunction under the tests employed in this Circuit.

WHEREFORE, IT IS ADJUDGED AND DECREED that defendants, their employees, agents and successors in office are preliminarily enjoined from enforcing 8 C.F.R. § 103.6(a)(2) (ii) and (iii) (1983) and 109.1(b)(8) (1983), which became effective December 7, 1983 (Federal Register, Vol. 48, No. 216, Pages 51142-44 (November 7, 1983)) or informing detainees that such regulations are in effect. Any such conditions already imposed pursuant to the new regulations shall be stricken.

Plaintiffs' attorney is ordered to prepare Findings of Fact and Conclusions of Law and submit them to this Court not later than January 3, 1984.

DATED: This 16th day of December, 1983.

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX H

8 U.S.C. 1103(a) provides:

Powers and duties of the Attorney General and Commissioner; appointment of Commissioner

The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with

the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish officers of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

8 U.S.C. 1182 provides in pertinent part:

Excludable aliens

(a) **General classes**

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the

wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title;

* * * * *

8 U.S.C. 1251 provides in pertinent part—

Deportable aliens

(a) **General classes**

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

8 U.S.C. 1252 provides in pertinent part—

Apprehension and deportation of aliens

(a) **Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees**

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2)[[regarding mandatory detention of aliens convicted of aggravated felonies], any such alien taken into custody may, in the discretion of the Attorney General and

pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

8 C.F.R. 103.6 provides:

Surety bonds.

(a) *Posting of surety bonds*—(1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases shall be executed on Form I-352, a copy of which, and any rider attached thereto, shall be furnished the obligor. A district director is authorized to approve a bond, a formal agreement to extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on Form I-312. All other matters relating to bonds, including a power of attorney not executed on Form I-312 and a request for delivery of collateral security to other than the depositor or his approved attorney in fact, shall be forwarded to the regional commissioner for approval.

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

(b) *Acceptable sureties.* Either a company holding a certificate from the Secretary of the Treasury under 6 U.S.C. 6-13 as an acceptable surety on Federal bonds, or a surety who deposits cash or U.S. bonds or notes of the class described in 6 U.S.C. 15 and Treasury Department regulations issued pursuant thereto and which are not redeemable within 1 year from the date they are offered for deposit is an acceptable surety.

(c) *Cancellation*—(1) *Public charge bonds.* A public charge bond posted for an immigrant shall be cancelled when the alien dies, departs permanently from the United States or is naturalized, provided the immigrant did not become a public charge prior to death, departure, or naturalization. The district director may cancel a public charge bond at any time if he/she finds that the immigrant is not likely to become a public charge. A bond may also be cancelled in order to allow substitution of another bond. A public charge bond shall be cancelled by the district director upon review following the fifth anniversity of the admission of the immigrant, provided that the alien has filed Form I-356, Request for Cancellation of Public Charge Bond, and the district director finds that the immigrant did not become a public charge prior to the fifth anniversary. If Form I-356 is not filed, the bond shall remain in effect until the form is filed and the district director reviews the evidence supporting the form and renders a decision to breach or cancel the bond.

(2) *Maintenance of status and departure bonds.* When the status of a nonimmigrant who has violated the conditions of his admission has been adjusted as a result of administrative or legislative action to that of a permanent resident retroactively to

a date prior to the violation, any outstanding maintenance of status and departure bond shall be canceled. If an application for adjustment of status is made by a nonimmigrant while he is in lawful temporary status, the bond shall be canceled if his status is adjusted to that of a lawful permanent resident or if he voluntarily departs within any period granted to him. As used in this paragraph, the term "lawful temporary status" means that there must not have been a violation of any of the conditions of the alien's nonimmigrant classification by acceptance of unauthorized employment or otherwise during the time he has been accorded such classification, and that from the date of admission to the date of departure or adjustment of status he must have had uninterrupted Service approval of his presence in the United States in the form of regular extensions of stay or dates set by which departure is to occur, or a combination of both. An alien admitted as a nonimmigrant shall not be regarded as having violated his nonimmigrant status by engaging in employment subsequent to his proper filing of an application for adjustment of status under section 245 of the Act and Part 245 of this chapter. A maintenance of status and departure bond posted at the request of an American consular officer abroad in behalf of an alien who did not travel to the United States shall be canceled upon receipt of notice from an American consular officer that the alien is outside the United States and the nonimmigrant visa issued pursuant to the posting of the bond has been canceled or has expired.

(3) *Substantial performance.* Substantial performance of all conditions imposed by the terms of a bond shall release the obligor from liability.

(d) *Bond schedules*—(1) *Blanket-bonds for departure of visitors and transits.* The amount of bond required for various numbers of nonimmigrant visitors or transits admitted under bond on Forms I-352 shall be in accordance with the following schedule:

Aliens

1 to 4—$500 each.
5 to 9—$2,500 total bond.
10 to 24—$3,500 total bond.
25 to 49—$5,000 total bond.
50 to 74—$6,000 total bond.
75 to 99—$7,000 total bond.
100 to 124—$8,000 total bond.
125 to 149—$9,000 total bond.
150 to 199—$10,000 total bond.
200 or more—$10,000 plus $5 for each alien over 200.

(2) *Blanket bonds for importation of workers classified as nonimmigrants under section 101(a)(15)(H).* The following schedule shall be employed by district directors when requiring employers or their agents or representatives to post bond as a condition to importing alien laborers into the United States from the West Indies, the British Virgin Islands, or from Canada:

Less than 500 workers—$15 *each*
500 to 1,000 workers—$10 *each*
1,000 or more workers—$5 *each*

A bond shall not be posted for less than $1,000 or for more than $12,000 irrespective of the number of workers involved. Failure to comply with conditions of the bond will result in the employer's liability in

the amount of $200 as liquidated damages for each alien involved.

(e) *Breach of bond.* A bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been breached creates a claim in favor of the United States which may not be released or discharged by a Service officer. The district director having custody of the file containing the immigration bond executed on Form I-352 shall determine whether the bond shall be declared breached or cancelled, and shall notify the obligor on Form I-323 or Form I-391 of the decision, and, if declared breached, of the reason therefor, and of the right to appeal in accordance with the provisions of this part.

8 C.F.R. 274a.12 provides:

Classes of aliens authorized to accept employment.

(a) *Aliens authorized employment incident to status.* Pursuant to the statutory or regulatory reference cited, the following classes of aliens are authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes, and specific employment authorization need not be requested:

(1) An alien who is a lawful permanent resident (with or without conditions pursuant to section 216 of the Act), as evidenced by Form I-151 or Form I-551 issued by the Service;

(2) An alien admitted to the United States as a lawful temporary resident pursuant to section 245A or 210 of the Act, as evidenced by an employment authorization document issued by the Service;

(3) An alien admitted to the United States as a refugee pursuant to section 207 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(4) An alien paroled into the United States as a refugee for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(5) An alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(6) An alien admitted to the United States as a nonimmigrant fiance or fiancee pursuant to section 101(a)(15)(K) of the Act, or an alien admitted as the child of such alien, for the period of admission of the United States, as evidenced by an employment authorization document issued by the Service;

(7) An alien admitted as a parent (N-8) or dependent child (N-9) of an alien granted permanent residence under section 101(a)(27)(I) of the Act, as evidenced by an employment authorization document issued by the Service;

(8) An alien admitted to the United States as a citizen of the Federated States of Micronesia (CFA/FSM) or of the Marshall Islands (CFA/MIS) pursuant to agreements between the United States and the former trust territories, as evidenced by an employment authorization document issued by the Service;

(9) An alien granted suspension of deportation under section 244(a) of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(10) An alien granted withholding of deportation under section 243(h) of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service; or

(11) An alien who has been granted extended voluntary departure by the Attorney General as a member of a nationality group pursuant to a request by the Secretary of State. Employment is authorized for the period of time in that status as evidenced by an employment authorization document issued by the Service.

(b) *Aliens authorized for employment with a specific employer incident to status.* The following classes of nonimmigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in; or subsequent change to, such classification. An alien in one of these classes is not issued an employment authorization document by the Service:

(1) A foreign government official (A-1 or A-2), pursuant to § 214.2(a) of this chapter. An alien in this status may be employed only by the foreign government entity;

(2) An employee of a foreign government official (A-3), pursuant to § 214.2(a) of this chapter. An alien in this status may be employed only by the foreign government official;

(3) A foreign government official in transit (C-2 or C-3), pursuant to § 214.2(c) of this chapter. An alien in this status may be employed only by the foreign government entity;

(4) A nonimmigrant crewman (D-1 or D-2) pursuant to § 214.2(d), and Parts 252 and 253, of this

chapter. An alien in this status may be employed only in a crewman capacity on the vessel or aircraft of arrival, or on a vessel or aircraft of the same transportation company, and may not be employed in connection with domestic flights or movements of a vessel or aircraft;

(5) A nonimmigrant treaty trader (E-1) or treaty investor (S-2), pursuant to § 214.2(e) of this chapter. An alien in this status may be employed only by the treaty-qualifying company through which the alien attained the status. Employment authorization does not extend to the dependents of the principal treaty trader or treaty investor (also designated "E'1" or "E-2"), other than those specified in paragraph (c)(2) of this section;

(6) A nonimmigrant student (F-1) who is in valid non-immigrant student status and pursuant to 8 CFR 214.2(f) is seeking on-campus employment for not more than twenty hours per week while school is in session or full time when school is not in session if the student intends and is eligible to register for the next term or session. Part-time on campus employment is authorized by the school and no specific endorsement by a school official or Service officer is necessary.

(7) A representative of an international organization (G-1, G-2, G-3, or G-4), pursuant to § 214.2(g) of this chapter. An alien in this status may be employed only by the foreign government entity or the international organization;

(8) A personal employee of an official or representative of an international organization (G-5), pursuant to § 214.2(g) of this chapter. An alien in this status may be employed only by the official or representative of the international organization;

(9) A temporary worker or trainee (H-1, H-2A, H-2B, or H-3), pursuant to § 214.2(h) of this chapter. An alien in this status may be employed only by the petitioner through whom the status was obtained;

(10) An information media representative (I), pursuant to § 214.2(i) of this chapter. An alien in this status may be employed only for the sponsoring foreign news agency or bureau. Employment authorization does not extend to the dependents of an information media representative (also designated "I");

(11) An exchange visitor (J-1), pursuant to § 214.2(j) of this chapter and 22 CFR 514.24. An alien in this status may be employed only by the exchange visitor program sponsor or appropriate designee and within the guidelines of the program approved by the United States Information Agency as set forth in the Certificate of Eligiblity (Form IAP-66) issued by the program sponsor;

(12) An intra-company transfereee (L-1), pursuant to § 214.2(1) of this chapter. An alien in this status may be employed only by the petitioner through whom the status was obtained;

(13) Officers and personnel of the armed services of nations of the North Atlantic Treaty Organization and representatives, officials, and staff employees of NATO (NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 and NATO-6), pursuant to § 214.2(o) of this chapter. An alien in this status may be employed only by NATO;

(14) An attendant, servant or personal employee (NATO-7) of an alien admitted as a NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6, pursuant to § 214.2(o) of this chapter. An alien admitted under this classification may be employed only by the NATO alien through whom the status was obtained; or

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (5), (8), (9), (10), (11), and (12) of this section whose status has expired but who has filed a timely application for an extension of such status pursuant to § 214.2 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 120 days beginning on the date of the expiration of the authorized period of stay. If the alien's application for extension of stay has not been adjudicated within this period, the alien may apply to the district director for employment authorization pursuant to paragraph (c)(15) of this section.

(16) A nonimmigrant pursuant to section 214(e) of the Act. An alien in this status must be engaged in business activities at a professional level in accordance with the provisions of Chapter 15 of the United States-Canada Free-Trade Agreement (FTA).

(c) *Aliens who must apply for employment authorization.* Any alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions indicated in the regulations or cited on the employment authorization document:

(1) An alien spouse or unmarried dependent, child, son or daughter of a foreign government official (A-1 or A-2) pursuant to § 214.2(a)(2) of this chapter;

(2) An alien spouse or unmarried dependent son or daughter of an alien employee of the Coordination Council for North American Affairs (E-1) pursuant to § 214.2(e) of this chapter;

(3) A nonimmigrant (F-1) student who:

(i) Is seeking off-campus employment authorization due to economic necessity pursuant to § 214.2(f) of this chapter. A student authorized employment under this section may use a properly endorsed I-20 ID issued to the student to establish employment authorization pursuant to 8 CFR 274a.2(b)(1)(v)(C)(7). To constitute a proper endorsement for this section, the Form I-20 ID must contain the date until which employment is authorized; a statement that the hours authorized per week while school is in session may not exceed 20 hours weekly; the identifying number of the Service officer; and the date and location of the endorsement.

(ii) Is seeking employment for purposes of practical training (including curricular practical training) pursuant to § 214.2(f) of this chapter, provided the alien will be employed only in an occupation which is directly related to his or her course of studies. A student authorized employment under this section may use a properly endorsed I-20 ID issued to the student, to establish employment authorization pursuant to 8 CFR 274a.2(b)(1)(v)(C)(7). A properly endorsed Form I-20 ID must contain the date until which employment is authorized; the occupation or field in which employment is authorized; the name, title and signature of the designated school official or the identifying number of the Service officer; and the date and location of the endorsement; or

(iii) Has been offered employment under the sponsorship of an international organization within the meaning of the International Organization Immunities Act (59 Stat. 669), if such international organization provides written certification to the district director having jurisdiction over the intended place of employment that the proposed employment is within the scope of the organization's sponsorship;

(4) An alien spouse or unmarried dependent, child, son or daughter of an officer or employee of an international organization (G-1 or G-4) pursuant to § 214.2(g) of this chapter;

(5) An alien spouse or minor child of an exchange visitor (J-2) pursuant to § 214.2(j) of this chapter;

(6) A nonimmigrant (M-1) student seeking employment for practical training pursuant to § 214.2 (m) of this chapter following completion of studies if such employment is directly related to the student's course of study;

(7) A dependent of an alien classified as NATO-1 through NATO-7 pursuant to § 214.2(n) of this chapter;

(8) Any alien who has filed a non-frivolous application for asylum pursuant to Part 208 of this chapter. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(9) Any alien who has filed an application for adjustment of status to lawful permanent resident pursuant to Part 245 of this chapter. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(10) Any alien who has filed an application for suspension of deportation pursuant to Part 244 of this chapter, if the alien establishes an economic need to work. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(11) Any alien paroled into the United States temporarily for emergent reasons or reasons deemed strictly in the public interest pursuant to § 212.5 of this chapter;

(12) Any deportable alien granted voluntary departure, either prior to or after hearing, for reasons set forth in § 242.5(a)(2) (v), (vi), or (viii) of this chapter may be granted permission to be employed for that period of time prior to the date set for voluntary departure including any extension granted beyond such date. Factors which may be considered in adjudicating the employment application of an alien who has been granted voluntary departure are the following:

(i) The length of voluntary departure granted;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief.

(13) Any alien against whom exclusion or deportation proceedings have been instituted, who does not have a final order of deportation or exclusion, and who is not detained may be granted temporary employment authorization if the district director determines that employment is appropriate. Factors which may be considered by the district director in adjudicating the employment application of such an alien are the following:

(i) The existence of the economic necessity to be employed;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief;

(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (5), (8), (9), (10), (11), and (12) of this section whose application for extension of stay has not been adjudicated within the 120-day period as set forth in paragraph (b) (15) of this section.

(d) *Basic criteria to establish economic necessity.* Title 45—Public Welfare, Poverty Guidelines, 45 CFR 1060.2 should be used as the basic criteria to establish eligibility for employment authorization when the alien's economic necessity is identified as a factor. The alien shall submit an application for employment authorization listing his or her assets, income and expenses as evidence of his or her economic need to work. Permission to work granted on the basis of the alien's application for employment authorization may be revoked under § 274a.14 of this chapter upon a showing that the information contained in the statement was not true and correct.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103 and 109

Powers and Duties of Service Officers; Availability of Service Records; Employment Authorization; Excludable Deportable Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations relating to the imposition of bond conditions against employment in the case of aliens who are placed in exclusion or deportation proceedings. Work authorization may be granted in certain instances, upon application by the alien. The decision to authorize employment will lie with the district director of the Service. The revisions will eliminate the present cumbersome procedures by which Regional Commissioners are authorized to impose bond conditions against employment.

EFFECTIVE DATE: December 7, 1983.

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For Specific Information: Robert J. Schmidt, Detention and Deportation Officer, Immigration and Naturalization Service, 425 Eye Street NW., Washington, D.C. 20536, Telephone: (202) 633-4120.

SUPPLEMENTARY INFORMATION: On March 2, 1983, a proposed rule was published in the Federal Register (48 FR 8820) to revise the regulations relating to work authorization of aliens apprehended or detained for immigration law violations. The proposed rule provided for revision of both 8 CFR Parts 103 and 109. The regulations up until the present have allowed an alien in deportation proceedings to work, unless a Regional Commissioner of the Service, upon recommendation by a district director, imposed a specific condition of release barring employment.

Under the final rule, only the district director will decide whether or not an alien in proceedings will be granted work authorization. In order to qualify for this privilege, the alien will have to apply for work authorization and establish that employment should be authorized at the discretion of the district director. The final rule contains factors which may be taken into account by the district director in considering employment authorization. The burden will be on the alien to establish that the authorization should be granted. Among the factors which may be considered are the presence of U.S. citizen or permanent resident relatives who were dependent on the alien for support, and the likelihood that the alien will qualify for some type of relief from deportation or exclusion.

Following publication of the proposed rule, a large number of comments were received. Critical comments may be roughly divided into five categories:

(1) That the rule went beyond the Service's statutory authority;

(2) That the rule would result in fewer bonds being written and more persons being detained;

(3) That the rule would impose significant hardships on citizens and permanent resident relatives and asylum seekers;

(4) That the proposed rule did not meet rule making standards as to determinations of economic impact under the Regulatory Flexibility Act or Executive Order 12291; and

(5) That the standards to be applied in granting employment authorization were unclear.

Of the criticisms, the first three represent a misinterpretation of the immigration law and the regulation itself.

These comments will be considered in sequence:

1. The comment that the rule went beyond the Service's statutory authority

Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252, authorizes the Attorney General to set conditions for release on bond. The standards applied must be reasonable. *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (BIA 1972); (A.G. 1974). A reasonable condition is one that prohibits an alien under deportation or exclusion proceedings from working without authorization. Such unauthorized work is a continuing violation of the immigration laws. Unauthorized work is in direct contravention of one of the "dominant purpose(s) of the immigration laws" which is "to protect American workers," as one commenter conceded, although further characterizing this determination as a "legislative determination."

Many commenters contended that the no-work condition is contrary to the purpose of the appearance bond, which is to assure the appearance of the alien at a deportation or exclusion hearing. Most commenters who focused on this issue asserted that assuring appearance was the *only* purpose of the bond. The Attorney General in 1974 found otherwise:

It is generally agreed that a basic purpose of the immigration laws is to protect against the displacement of workers in the United States. Thus, under an approach similar to that used in *Earle*, [*Earle v. United States*, 254 F2d 384 (2 Cir. 1958); cert. denied, 358 U.S. 822 (1958)] it may be that section 103(a) and the Attorney General's broad authority to enforce the immigration laws afford an independent basis for requiring of persons subject to deportation proceedings bonds prohibiting unauthorized employment. Such bonds are frequently required of nonimmigrant aliens seeking either admission to the United States, or an extention of their stay. It may be proper to impose a similar requirement upon aliens who become subject to deportation proceedings. The result would be a bond serving two related but independent purposes. *Matter of Toscano-Rivas*, at 555.

It is clear from this that a bond condition barring unauthorized employment may have dual purposes. While it is true that most bond conditions are aimed at ensuring appearance of an alien, there does not appear to be any reason under Section 242 of the Act to limit conditions of release. For example, where a nonimmigrant visitor is apprehended for violating the conditions of his stay by working, it is entirely appropriate to impose, as a condition of release, a condition barring further unauthorized employment. If this is not done, upon release, the alien could simply continue his employment with impunity until a deportation hearing was scheduled and through the appeal process. There is no provision in the immigration law which mandates such a result.

A condition barring employment could, therefore, be used in tandem with a money bond whose purpose would be to insure the alien's appearance. The violation of a condition barring employment would not necessarily lead to a breach of the money bond, because the alien might appear even if he or she were violating the condition against unauthorized employment. Where the "no work" condition is violated, the appropriate response would be to take the alien into custody.

The argument that the Service would be using a *bond* for improper purposes, i.e., "no work," misses the point. It is not the bond which imposes "no work." Rather, "no work" is a condition of release, which, if violated, gives the Service the right to order the alien to surrender and appear. If the alien fails to appear following a breach of the condition of release, the Service may declare the bond to be in default, just as if the alien failed to appear at a scheduled court date. The bond requires the bonding company to pay (or the alien to forfeit a cash bond) upon the alien's unexcused failure to appear, either upon a date certain or upon an order to surrender following a breach of a condition of release. The Service is imposing "no work" as a condition of release, unless, of course, the alien applied to and received, from the district director, permission to work.

Most importantly, the regulation does not necessarily change the number of aliens ultimately allowed to work. In each case, if an alien desires to work, the response to the inquiry could be the same. There is just a different starting point. The person seeking to work will have the burden of going forth with the application to the district director, who is the party best able to consider that application.

Under this formulation, the comments made by many commenters to the effect that bonds could not be written if the alien did not work, were based, in part, on a fales premise. The premise was that violation of the "no work" condition would necessarily lead to bond breach.

2. The comment that the rule would result in fewer bonds being written and more aliens being detained

In considering whether to publish the proposed rule, Service officials were aware that bonding companies and other sureties might be affected by the rule. It was understood that in certain instances a bond might not be quite as attractive if a "no work" release condition were imposed. The possibility that a bonding company might require more collateral or charge higher premiums was also considered. As a corollary of these possibilities, it was also assumed that more aliens might have to be detained. This latter possibility was considered an acceptable consequence. In balance, it was decided that prevention of employment by illegal aliens and safeguarding of employment of U.S. citizens and permanent resident aliens were more important considerations than inconvenience to bonding companies or increased detention costs.

3. The comment that the rule would impose significant hardships on citizens and permanent resident aliens and asylum seekers

These comments failed to take into account the fact that the proposed rule specifically provided protections for persons in these categories. In the first instance, permanent resident aliens are not affected by these release conditions. Until such time as permanent resident status is lost, the permanent resident

alien has the right to work in the United States, if released on bond. The Service, therefore, has no intention of applying this condition to a permanent resident alien in exclusion or deportation proceedings.

The regulation also allows a district director to take permanent resident and U.S. citizen relatives into account when considering an application for employment authorization. If the alien in proceedings supports such relatives, employment may be authorized.

Aliens who have applied for asylum will not be affected by these regulations. Employment is governed by 8 CFR Part 208. Those provisions allow a district director to authorize employment for an asylum applicant who has filed a non-frivolous asylum application.

4. The criticism that the proposed rule did not meet rule making standards relating to economic impact determinations under the Regulatory Flexibility Act or Executive Order 12291

A. *Executive Order 12291.* A large number of commenters stated that the proposed rule was a "major rule" under Executive Order 12291 because of its effect on bonding agencies, aliens and their families, the Service, and State and local governments. The gist of the criticisms was that a no-work condition would result in no bonds being written because bonding companies would not bond unemployed aliens. As a consequence, aliens would have to be detained, or the alien would be released and have to be supported at public expense, along with the alien's family.

Under the Executive Order, a "Regulatory Impact Analysis and Review" is required for every "major

rule." This includes a rule which is likely to result in "A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions." If the rule is "likely" to result in these consequences, then a detailed analysis must be undertaken, following the prescribed format, and transmitted to OMB.

The discussions surrounding the decision to publish the proposed rule included consideration of the effects of the new procedures on various parties. The impact of the rule on bonding companies was considered. The conclusion was that the number of companies affected, and the adverse effects they might feel as a result of the no-work rider provision, were quite limited. Other adverse effects, such as possible increased welfare costs if aliens were denied work authorization, were thought to be minimal, because it was anticipated that allowances would be made for work authorization for aliens with citizen or permanent resident dependents or other substantial equities. Because the discussions revealed no major impact on any segment of the public, the rule as contemplated was not a "major rule" and therefore not subject to an impact review and analysis.

B. *5 U.S.C. 603 requires a "regulatory flexibility analysis"*. Many commenters cited the Administrative Procedures Act (APA) in criticizing the proposed rule. Under this provision, an agency is required, before publishing a notice of proposed rule making, to "prepare and make available for public comment an initial regulatory flexibility analysis." This analysis is published with the notice of proposed rule making.

This analysis is not required if the head of the agency certifies, pursuant to 5 U.S.C. 553(f), that

the rule will not have a significant economic effect on any "substantial number" of small businesses, organizations or governments. The Commissioner in fact made this certification.

In the period prior to the publishing of the proposed rule, the Service engaged in a good deal of internal discussion relating to both the content and the effect of the proposed rule. The decision to publish the rule was made after conversations among the Regional Commissioners and the Central Office Management. It was apparent during these deliberations that certain bonding companies might not consider the proposed rule to be in their best interest. It was also understood that the number of companies involved in immigration bond writing was quite small.

The claims made regarding adverse effects on governmental units fail to take into account the definitions contained in the regulatory flexibility provisions. It is not necessary for an agency to take into acount costs to the Federal or State governments. The analysis by its clear terms applies to "small governmental jurisdictions" such as cities, counties, towns and villages, with a population of less than 50,000 persons (5 U.S.C. 601). None of the commenters seemed aware of the scope of the flexibility analysis in these terms. The costs the commenters project are thus based on faulty assumptions.

It is our conclusion that criticisms of the rule making procedures as they relate to the regulatory flexibility analysis are basically flawed because of the misconceptions as to the applicability of the provisions. In addition, it is our position that we made an "initial regulatory flexibility analysis" during consideration of the rule making and that the management level discussions on this topic were sufficient, although not reduced to formal studies or writings.

5. The criticism that the standards to be applied in granting employment authorization were unclear

Some of the commenters provided useful criticisms of the factors to be considered in adjudicating a request for employment authorization. In particular, they questioned whether the Service had the authority to consider "dislocation" of American workers and the "impact" of such employment. Several commenters described this as more appropriately a function of the Department of Labor. These criticisms have substance to them. "Dislocation" is a term difficult to define and quantify. This factor is deleted from the final rule.

Factor (C) of the proposed rule, the "number of aliens involved" in unauthorized employment, was criticized because it did not specify if it referred to a particular industry or to the work force as a whole. It was also criticized as being part of the "dislocation" and "impact" determinations more suitably made by the Department of Labor. This factor is deleted from the final rule.

One commenter stated that two other factors of the proposed rule appeared to be contradictory: Factor (F), the "recentness" of the alien's arrival, and factor (G), the acceptance of employment "shortly after the alien's arrival." The commenter suggested that a long-term resident may have taken employment shortly after arrival, and inquired as to which factor would take precedence. Because of the ambiguity surrounding these factors, and because they are not essential considerations, they have been deleted from the final rule.

Comments on factors (H) and (I) were mixed. These factors are in the final rule, as they are important factors in the fair consideration of employ-

ment requests, and have been used in the general employment authorization regulations contained in 8 CFR 109.1(b).

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegation (Government Agencies), Bonding, Bonds, Surety bonds.

8 CFR Part 109

Aliens, Employment.

Accordingly, Title 8, Chapter I of the Code of Federal Regulations is amended as follows:

PART 103—POWER AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. In § 103.6, paragraph (a)(2) is revised to read as follows:

§ 103.6 Surety bonds.

(a) * * *

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the

District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

* * * * *

PART 109—EMPLOYMENT AUTHORIZATION

2. In § 109.1, a new paragraph (b)(8) is added to read as follows:

§ 109.1 Classes of aliens eligible.

* * * * *

(b) * * *

(8) An excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.

* * * * *

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

Dated: October 12, 1983.

Alan C. Nelson,

Commissioner, Immigration and Naturalization.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, et al.,
Petitioners,
vs.
NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether section 242(A)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1152(A)(1), precludes district court subject-matter jurisdiction over plaintiffs' Constitutional and statutory challenge to a nation-wide, blanket regulation prohibiting people arrested by the Immigration and Naturalization Service (INS) from working pending the outcome of their deportation hearings?

2. Whether a regulation promulgated by the INS requiring indefinite detention without bond for persons who work without agency permission pending the outcome of their deportation hearings exceeds the statutory authority on detention, INA § 242(a), 8 U.S.C. § 1252(a)?

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In The Supreme Court of the United States

October Term, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In this case neither the district court nor the court of appeals reached the sweeping decision Petitioners claim in their Petition for Writ of Certiorari ("Cert.Pet."). The court of appeals did not decide that the Attorney General has "no authority for *detention* in relation to unauthorized employment." Cert.Pet. at 23 (emphasis in original).[1] The court of appeals' opinion does *not* restrict the INS from imposing employment-related conditions in release bonds which are "rationally related" to the purposes of Section 242(a) (appearance at future proceedings or the public safety or national security). App. 24a.

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[1] The Petition quotes half the court's sentence, which reads in full: "Further, our review of the treatment of employment riders by the Board of Immigration Appeals and the Attorney General discloses no authority [in their decisions] for detention in relation to unauthorized employment." App. 35a.

This case involves something else: INS regulations which impose a *blanket*, non-individualized condition on all release bonds prohibiting employment pending the outcome of statutorily mandated deportation proceedings. Those unable to accept the "no-work" bond rider condition, are denied bail; those caught working in violation of the condition are rearrested and jailed without bond until proceedings to determine their deportability are completed, a process that often takes years. In short, this unprecedented regulation, promulgated thirty years after the statute upon which it relies, tells immigrants that they are welcome to exercise their right to a deportation hearing, but must do so either while jailed indefinitely or while going cold, hungry and homeless, and without the ability to retain counsel. App. 47a (the reguation "force[s]" those arrested "to choose between starving on the streets or remaining in detention").

I. Alien Employment in the Immigration Act

Since 1952, Congress has amended the INA numerous times, including several provisions dealing with employment. However, Congress has never seen fit to enact a statute providing for the detention of aliens who become employed without INS authorization. On the contrary, Congress has repeatedly enacted provisions allowing aliens to win relief from deportation or regularize their status *despite* previous or on-going unauthorized employment. *See, e.g.*, 8 U.S.C. §§ 1182(a), (c), 1253(h), 1254, 1255, 1255a(d)(2)(A).[2]

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[2] Petitioners pretend that the majority of immigrants coming to the United States need employment authorization, with the "exception" of close relatives of U.S. citizens and lawful permanent residents. Cert.Pet. 3. In fact, the vast majority of immigrants need no employment authorization at all. 1987 *Statistical Yearbook of the Immigration and Naturalization Service*, at xvii, Table A (80% of all lawful immigrants enter without having to obtain employment certificates). Furthermore, Congress has opted not to deny visas to aliens who have previously worked in the United States without authorization. INA § 212(a), 8 U.S.C. § 1182(a). Petitioners are wrong when they state that in 1976, Congress provided, in 8 U.S.C. § 1255(c)(2), that "aliens could not become permanent residents if they accepted unauthorized employment before filing their adjustment applications." Cert.Pet. 4. If they are the "immediate relative" of a U.S. citizen, these aliens (the vast majority of immigrants) *can* adjust their status in the United States *regardless of prior unauthorized employment*. § 1255(c). Others are not denied "permanent resident" status as claimed by Petitioners -- they must simply depart the U.S. and obtain their visas at a U.S. consular office abroad. INA § 204, 8 U.S.C. § 1154.

In any event, the significance of the regulation at issue has been completely overtaken by Congress' enactment of the Immigration Reform and Control Act of 1986, Pub.L.No. 94-571, §6, 90 Stat. 2705-2706 ("IRCA"). Unlike INS's approach to alien employment (indefinite detention without bond), the IRCA is a carefully crafted political compromise which balances specifically chosen measures discouraging illegal employment with measures to avoid disruption of production. *See* Mazzoli, *Immigration Reform: The Path to Passage and Beyond*, 14 J.Legis. 41 (1987).[3]

The IRCA regulates employment through *employer* sanctions. INA § 274a, 8 U.S.C. § 1324a.[4] Leading up to the enactment of employer sanctions, top INS officials repeatedly testified in Congress that detaining aliens for working without authorization pending the outcome of deportation hearings was *not* an option considered necessary by the INS.[5]

In the months leading up to the passage of the IRCA, Congress specifically rejected detention of unauthorized *employees* as. A

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[3] Exemptions in IRCA, see *infra*, were intended to "mitigate adverse effects [of the bill] on the supply of labor." Rand Corporation, *Enforcing Employer Sanctions* (1990) at 36.

[4] *See* H. R. Rep. No. 99-682(I) at 45 ("The bill [IRCA] establishes penalities *for employers . . .*")(emphasis added); *Id.* at 46 ("Employers will be deterred by the penalties in this legislation...").

[5] Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No. 13, pts. 1-5, pt. 1 at 46 ("1971 Hearings") (testimony of James L. Hennessey, Executive Assistant to the Commissioner of the INS: *"We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him"*); 1971 Hearings, pt. 3 at 919 (testimony of Thomas M. Pederson, INS District Director for Detroit: *"I do not feel that . . . imprisonment is the answer "* to unauthorized employment); 1971 Hearings, pt. 1 at 89-90 (testimony of Southwest Regional Counsel Joseph Sureck: "I personally am not so concerned to add a further penalty upon an [unauthorized] employee").

witness before the Senate Immigration Subcommittee proposed "detention of the illegal worker" -- rather than employer penalties -- as the vehicle to deter unauthorized employment. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45. Correctly noting that this idea was "not something new," *id.* at 56, Senator Simpson, Chairman of the Committee and primary author of IRCA in the Senate, scored the detention approach as being "politically harsh, . . . [and] unrealistic..." Id.[6]

In reporting the IRCA to Congress the House Judiciary Committee declared itself "convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess., at 46 *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5650. The Attorney General agreed: Only through "employer sanctions" can the "entry of illegal aliens into jobs" in the U.S. "be addressed effectively." *Id.* at 105.

INS's "no work" regulation also conflicts with important exemptions created within IRCA. To avoid disruption of production, Congress provided that aliens *without* work authorization hired before the date of enactment may continue to be employed *without* penalty on the employee or employer. Pub. Law No. 99-603, 100 Stat. 3359, 3372, Sec. 101(a)(3) ("Grandfather For Current Employees"). While IRCA exempts hundreds of thousands of these "grandfathered" workers from the impact of employer sanctions,.INS's challenged regulation prohibits their employment.

As a result of this statutory exemption, numerous INS administrative and judicial proceedings have taken place regarding the

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6 Senator Simpson expressed his opposition to the detention proposal, stating that although it "pointed out that there are some very fascinating ways to present to the subcommittee what we should do about illegal immigration ... it was my thought, and the thought of the Select Commission, we ought to try the most humane one [i.e. employer sanctions] first ... if we do not get that done, then we will go on to other methods ... [today] are expressed out of frustration ..." *Id.*

meaning of "grandfathered employees."[7] Other federal agencies, including the National Labor Relations Board (NLRB), have relied upon the fact that "the applicable INS regulations [8 C.F.R. § 274a.2(b)(v)(iii)(E),(G)] provide that the 'grandfather' requirement of continuing employment is met *where an employee is reinstated after a wrongful termination* . . ." NLRB Memorandum GC-88-9, *Reinstatement and Backpay Remedies for Discriminatees Who Are 'Undocumented Aliens'* (September 1, 1988) (emphasis added).[8]

INS's 1983 "no work" regulation is completely out of step with IRCA's exemptions to employer sanctions. At this stage there is little policy reason for review of INS's outdated 1983 regulations by this Court.

II. The Immigration Act and Detention

Pursuant to INA § 287, 8 U.S.C. § 1357(a)(2), a person may be arrested by INS if "believed to be in the United States in violation of law." Following arrest, approximately 97.5% of all persons waive their right to a hearing and agree to accept "voluntary departure."[9] This case involves only the 2.5% of arrested persons who wish to exercise their right to a hearing. While INS's regulation pressumes that all arrested people are deportable, and therefore can be denied the ability to work, at the deportation hearing it is uncontested that the INS has the burden of proving deportability by "clear, unequivocal and convincing evidence . . ." *Woodby v. INS*, 385 U.S. 276, 488 (1966). As this Court has recognized, "[t]here is no assurance that a [person] subject to deportation [proceedings] will ever be deported."

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7 *See generally* Employers' Immigration Compliance Guide, Mathew Bender, Rel. 24 (Jan. 1989) at 3; Rel. 25 (Feb. 1989) at 2; Rel. 26 (Mar. 1989) at 2. *See also Maka's Akami Service v. INS*, 904 F.2d 1351 (9th Cir. 1990); *USA v. Scandia Interiors*, Executive Office for Immigration Review (EOIR), Case No. 90100229 (Jan. 25, 1991) (available on Lexis) at 4-5 (because alien workers were "grandfathered," they were not "unauthorized aliens" for employment purposes); *USA v. Walia's, Inc.*, EOIR, Case. No. 89100259 (Jan. 5, 1990) (interpreting "grandfather" provision).

8 *See* Interpreter Releases, September 26, 1988, at 1001-1007.

9 *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044, 104 S.Ct. 3479, 3486, 82 L.Ed.2d 778 (1984).

Plyler v. Doe, 457 U.S. 202, 206 (1982). Persons arrested by the INS are often entitled to be and remain in the United States.[10]

INA § 242(a), 8 U.S.C. § 1252(a), provides that following arrest persons may be

> continued in custody or . . . released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe.

Id. For twenty (20) years following the enactment of § 242, the INS read "containing such conditions as the Attorney General may prescribe" to refer to conditions relating to the persons *presence* for hearings and deportation, and conditions to protect national security.

III. INS Bond Regulations and Employment

The INS "admit[s] that [until the "no work" regulation was issued] immigration judges considered the alien's employment history as indicative of stability and an assurance that he will not abscond." App. 34a.

In 1973 INS promulgated regulations which provided that the district director could impose in *individual* release bonds "a condition barring unauthorized employment . . ." 8 C.F.R. § 103.6(a)(2)(ii). However, until the "no work" regulation was issued in 1983, detention was never considered a permissible response to

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[10] *See, e.g., Local 512, Warehouse & Office Workers v. NLRB*, 795 F.2d 705, 721 (9th Cir. 1986); *Whetstone v. INS*, 561 F.2d 1303 (9th Cir. 1977) (deportation reversed, respondent entitled to permanent resident alien status); *C.M.K. v. Richardson, Attorney General*, 371 F.Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States"); *Liacakos v. Kennedy*, 195 F.Supp. 630 (D.D.C. 1961) (deportation order set aside, respondent a "natural born citizen of the United States"); *Matter of Battista*, BIA Interim Decision 3036 (Oct. 21, 1987) (respondednt arrested and placed in deportation proceedings in 1983; BIA reverses deportation order four years later)Matter of Naulu, BIA Interim Decision 3005 (Jan. 30, 1986) (found deportable by Immigration Judge in 1983; reversed by BIA three years later). *See, generally*, Mitgang, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, 8 Univ. of Calif. Davis L. Rev. 323 (1975).

unauthorized employment. In *Matter of Toscana-Rivas*, 14 I&N 523, 542, Int.Dec. # 2256 (1973), the Board stated:

> Even if the bond is breached [in violation of an individualized condition barring unauthorized employment], it by no means follows that confinement is desirable or indicated, or will necessarily take place . . .
>
> * * *
>
> The penalty is not detention . . . but the loss of the $500 . .

Id. at 539. Even the INS "emphatically disavow[ed]" any intention of detaining aliens who worked without authorization. *Id.* at 542.

The Attorney General examined the issue presented in *Toscana-Rivas* and concluded that employment-related conditions were acceptable *after* deportability was established in "*cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security.*" *Id.* at 556 (emphasis added). The Attorney General required an individualized showing. *Id.* at 556-57 & n. 23.

Finally, in 1983 the INS promulgated the "no-work" regulation, which provides, in relevant part:

> A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding ... unless the District Director determines that employment is appropriate . . .
>
> *Only those aliens who* upon application under § 109.1(b) of this chapter *establish compelling reasons for granting employment authorization may be authorized to accept employment.*

8 C.F.R. § 103.6(a)(2) (1983) (emphasis added).[11]

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[11] Among the factors which "may" be considered when an application is made, are the following: (1) Safeguarding employment opportunities for United States citizens; (2) Whether there is a reasonable basis for considering discretionary relief; and (3) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist. Whether or not these factors are

The notice accompanying the final regulation states that the condition barring employment will not be imposed against individuals "maintaining a colorable claim to U.S. Citizenship and permanent resident aliens . . ." 48 Fed.Reg. 51143. Neither the regulation nor the INS's Operating Instruction (internal guidelines) describe the procedures for distinguishing a "colorable" claim. If INS believed a person had a "colorable" claim to citizenship or lawful resident status, they would not initiate a deportation hearing in the first place.[12]

A small number of aliens already have employment authorization at the time they are arrested by the INS. 8 C.F.R. § 274a.12(c) (categories of non-immigrants, including tourists, students, etc., sometimes granted employment authorization incident to their status). INS states that the "no-work" regulation "would not diminish any employment authorization that [such] an alien already had" at the time of arrest. Pet.Cert. at 8, 19, 20.[13] However, another regulation

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present, the INS may or may not exercise its discretion to grant employment authorization.

[12] The text of the challenged regulation provides no exemption and the INS earlier conceded that the "no work" bond condition is *not* automatically waived for U.S. citizens and lawful permanent residents: "In cases in which the condition may be erroneously applied [to U.S. citizens or lawful permanent residents], such persons can easily prove their authorization to work by producing their 'green cards' . . . [or] their file number to the INS so that their status can be verified." Appellants Brief to Ninth Circuit (Oct. 30, 1985) at 39-40. This fails to recognize that the majority of people living in this country do not have INS files that can be "verified." Many U.S. citizens cannot "easily" produce proof of birth in this country. The district court, which received testimonial and documentary evidence, noted that "all aliens who post bond are automatically subjected to the no-work condition . . . At a minimum, individuals subjected to the no-work condition will be unable to work and support themselves until the District Director . . . determines that they may do so." App. 116a.

[13] INS asserted for the first time on appeal that "anyone who has work authorization can easily establish this fact." App. 12a; see also Cert.Pet. 19 (proof of prior work authorization "should be readily available" to the detained alien). As we point out above, no matter how "easy" the task, it is of no importance since the regulations specifically

clearly does so. Employment authorization "*automatically terminate[s]*" upon arrest and the initiation of deportation proceedings. 8 C.F.R. § 274a.14(a)(1)(ii). In fact, no "notice of intent" to revoke is even required. § 274a.14(a)(2).

The vast majority of citizens, non-citizens and, of course, INS arrestees do not possess "work permits" issued by the INS. The "no-work" regulation applies to all such persons. People arrested by the INS cannot be released from detention without agreeing to the "no-work" rider condition, and they cannot apply or reapply for work authorization until they are released from detention. § 274a.12(c)(13). As stated by the court of appeals: "Application for authorization to work is dependent upon release from detention; release from detention is dependent upon the promise not to work." App. 8a.

The challenged regulation allows application for work authorization only following release and if *"compelling reasons"* are shown. 8 C.F.R. § 103.6(a)(2)(iii) (emphasis added). If "compelling reasons" are established, the person *"may* be authorized to accept employment" if the INS "determines that "employment is appropriate." *Id.* (emphasis added). The *uncontroverted* evidence established that INS had no consistent procedure for the processing of work authorization applications, and rarely granted such authorization when it was sought.[14] While the bond condition can be reviewed by an Immigration Judge, that procedure is "informal" and not a due process hearing.[15] In the informal "bond redetermination"

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provide that employment authorization ends upon arrest and the initiation of deportation proceedings.

[14] *See, e.g.* C.R. 16 (Exhibit AA ¶ 13); C.R. 16 (Exhibit CC ¶ 4) (8 months to receive a decision); C.R. 16 (Exhibit DD, ¶ 4[g]) (no criteria; 80% denial rate); C.R. 16 (Exhibit GG, ¶ 4) (same); C.R. 16 (Exhibit OO ¶ 6) (same); C.R. 16 (Exhibit PP ¶s 7-9) (same); C.R. 16 (Exhibit RR ¶ 5) (often takes "years" to receive a decision).

[15] *See* INS' Opening Brief, filed in the Court of Appeals, dated February 22, 1984 at 9 n. 4; *see also* Reporter's Transcript of Proceedings (12-16-83) ("R.T.") at 19, lines 11-14 (Government states to district court: "The Government has never represented in the course of these proceedings that a transcript was made of the bond redetermination] hearing."; *see also* R.T. 130, line 15; R.T. 32, line 22; R.T. 130, line 20; R.T. 132, line

proceedings, no record is made, and the person seeking to remove a no-work restriction is rarely permitted to testify, present witnesses, or rebut derrogatory evidence.[16] Such review can take from a few days to "two months or more." RT II at 29; RT II at 138 (same). When an individual sought removal of an employment prohibition *after* release, it can take INS "an entire year" before a hearing is even scheduled. C.R. 16, Exhibit AA at 4.

Persons released on bond will be arrested and detained *without bond* if found working in violation of the "no-work" rider. 48 Fed.Reg. 51142 ("[w]here the 'no work' condition is violated, *the appropriate response would be to take the alien [back] into custody*") (emphasis supplied). No due process hearing of *any* type is provided *before or after* a person's ability to work or remain free on bond is terminated.

IV. The Challenged Regulation's Intended Purposes

The uncontested evidence shows that the blanket no-work bond condition *does nothing to preserve jobs for U.S. workers*, its intended purpose.[17] Dr. Leo Chavez, a specialist in migration to the United States, testified in the district court that the relationship between "no-work" bond conditions, which effect only a few thousand persons each year who contest deportability, and protecting jobs for U.S. workers is "like making a dam out of a bucket of sand and trying to stop all the rivers that flow to the ocean." RT II at 90.

Dr. Patricia Hernandez Kelly, an expert on labor migration, testified that she could think of no evidence indicating that the "no-work" regulations would decrease the unemployment of U.S.

16; C.R. 16 (Exhibit DD at 11 lines 6-28) (all relating to informal nature of bond redetermination hearing before Immigration Judges).

[16] C.R. 16 Exhibit AA ¶¶ 10-11; C.R. 16 Exhibit DD at 11; R.T. 130, line 15; R.T. 32, line 22; R.T. 42, lines 3-14; R.T. 130, line 20; R.T. 132, line 16.

[17] Although the INS justified the new regulations as preserving employment for authorized workers, the regulations in fact *eliminated* all but one of the labor market considerations set out in the original 1973 regulations and the proposed 1983 regulation. *See* 8 C.F.R. § 103.6(a)(2)(ii); Fed.Reg. Vol. 48, p. 8820.

workers. RT II at 124. She described the effect of the regulation akin to "*throwing dice*." RT II at 114, 116 (emphasis added).[18]

Throughout seven years of litigation INS has not offered a shred of evidence to show any relationship between its regulation and the preservation of jobs for U.S. citizens.

INS states that the challenged regulation is also meant to remove the "incentive" of arrested persons "to delay deportation proceedings." Cert.Pet. at 8. The regulations demand that working people choose either their stomachs or their constitutional right to a deportation hearing. The penalty imposed by Petitioners' regulations does not distinguish between "delays" in expulsion fully justified because the person might not be an alien at all, *or* may not be a deportable alien, and those not similarly justified; nor, for that matter, who is to blame for the delay. Recent studies suggest that the INS and immigration courts, not those subjected to deportation proceedings, bear most of the blame for delays in concluding hearings.[19] INS has never submitted a shred of evidence indicating that Respondents or their class members in *any* way have sought to "delay" their deportation proceedings. Nor has the INS offered any mechanism to allow people deprived of their ability to work to expedite such hearings.

[18] For its part, the INS could produce *no* evidence that preventing people from working pending the outcome of deportation proceedings would increase job opportunities for U.S. workers. Given the small number of persons who assert their right to a hearing, it would be a rare citizen who would find employment as a result of the INS's disapproved regulations.

[19] *See, e.g.*, Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, Vol. 2, No. 2 International Journal of Refugee Law at 252, 259-60 (1990) ("majority" of delays caused by Government).

V. The Harm Caused by the "no Work" Regulation

The record in this case is replete with references to the detrimental effects of forcing persons released on bond to become unemployed. The no-work bond condition would directly effect their ability to win release on a reasonable bond.20 It effects their ability to obtain health care when needed. RT II at 102-103. Most would not be able to support themselves. RT II at 46. Such persons would have difficulty retaining counsel to represent them in their deportation proceedings.21 Many would be forced to abandon their right to appear and contest deportation.22 While the INS undertook *no* studies or investigation to determine the impact its regulation would actually have on anything, the agency does not dispute that "the ultimate result is that a *substantially* larger number of aliens will be unable to secure immigration bonds and *will be detained* ***indefinitely*** pending the resolution of their claims [in deportation proceedings]." App. 17a (emphasis added).

As discussed in detail *infra*, the court of appeals' decision in this case neither conflicts with the decisions of other court of appeals, nor does it decide an important question of federal law which has not been, but should be, settled by this Court. Nor can it be argued that the court of appeals misapplied, misconstrued or misconceived applicable Supreme Court decisions. As we discuss next, those decisions are clear and were literally applied by the court of appeals in this case.

ARGUMENT

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20 Eleven of the Respondents were in INS detention, unable to secure their release because of the "no work" bond condition. C.R. 13 at 8-16. For those not in detention, the challenged regulation directly affected their ability to survive pending the outcome of their deportation hearings. C.R. 13 at 9, 11 and 16.

21 *See, e.g.*, C.R. 4 (Exhibit B ¶ 4[a]); C.R. 4 (Exhibit C ¶ 4); C.R. 4 (Exhibit D ¶ 8); C.R. 4 (Exhibit E ¶ 6); C.R. 16 (Exhibit HH); RT II at 134.

22 *See, e.g.*,C.R. 4 (Exhibit B at 4); C.R. 4 (Exhibit C ¶¶ 3 and 6); C.R. 4 (Exhibit D ¶ 6).

I. The District Court Possessed Subject Matter Jurisdiction

The INS challenges the jurisdiction of the district court, asserting that "[t]he INA limits review of 'any determination . . . concerning . . . release on bond' to individual habeas corpus proceedings." Cert.Pet. 14, *citing* 8 U.S.C. § 1252(a)(1). Section 1252(a)(1) on its face deals only with complaints about *delays* in determining deportability in individual cases. App. 4a-5a. This case has *nothing* to do with delays in reaching decisions on deportability.

Jurisdiction is proper under 28 U.S.C. § 1331 and 8 U.S.C. § 1329. *McNary v. Haitian Refugee Center, Inc.*, No. 89-1332 (February 20, 1991).

II. The "No-Work" Regulations Are Ambiguous Making This An Inappropriate Case For Supreme Court Review

As we discuss in detail *infra*, this Court has previously ruled on the power to detain under INA § 242(a), and those decisions have been followed by the lower courts for decades. There is little reason for this Court to revisit the issue based upon regulations the meaning of which have become more ambiguous over time as INS has retreated from the plain meaning of the words of the regulation at various stages of the litigation.

Judge Trott's dissent points out that there is now little agreement in this case over the meaning of INS's regulations:

> I am not sure what this case is about . . . I suppose its none of my business, but it seems the way out of this power struggle is for the *INS to cure the ambiguities in its regulatory scheme so that the regulations accurately reflect its objectives* . . . If [INS did so], it has the untrammeled power to get [this case] over with and end this debate."

913 F.2d at 1375 (J. Trott, dissenting)(emphasis added).

The "debate" involves whether INS's regulation bars "employment" or "unauthorized employment." While the caption of the regulation refers to "unauthorized employment," the body of the regulation speaks only of prohibiting "employment." 8 C.F.R. § 103.6(a)(2)(ii). The notice accompanying the final rule referred to the condition as a *"no-work rider"* that would be imposed on every bond in the country. 48 Fed.Reg. 51142-43 (Nov. 7, 1982) (emphasis

added).[23] "[T]he heading of a section cannot limit the plain meaning of the text." *Railroad Trainmen v. B. & O.R. Co.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947) (statutory interpretation).

Further confusion is generated because the challenged regulation states that "*[o]nly*" those aliens who, "upon application under § 109.1(b) of this chapter" establish compelling reasons for granting employment authorization may be authorized to accept employment. 8 C.F.R. § 103.6(a)(2). However, because of subsequent amendments in the regulations, INS no longer has a § 109.1(b) "under" which arrested persons subject to the challenged "no work" bond rider can make "application" for removal of the "no work" condition.

III. The Language of Section 242 Does Not Authorize INS's Blanket No-Work Bond Condition

Section 242(a) is entitled "Arrest and Custody." It deals with whether a respondent in deportation proceedings shall be "continued in custody" or "released under bond . . . containing such conditions as the Attorney General may prescribe" pending the outcome of deportation proceedings. Every aspect of the statute concerns *where* the respondent will be pending resolution of the deportation hearing. The statute employs no words or phrases authorizing the INS to impose blanket employment restrictions in bonds written to secure a respondent's release from detention.[24]

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[23] INS's internal Operating Instruction issued pursuant to the "no-work rider" regulation requires INS employees releasing persons on bond pending the outcome of their deportation hearings to stamp their Order to Show Cause document (which contains the bond upon which release is obtained) with the words: "Bond -- Employment Not Authorized." Record at 44, Exhibit A.

[24] It should be stated at the outset that Petitioners' contention that this Court should defer to the Attorney General's interpretation of the Congressional is without merit. As we have discussed in the Statement *supra*, the Attorney General has had anything but a long-standing interpretation in this matter. If the agency construction has not been uniform, and it has not been here, "the rule which attaches great weight to

The ordinary meaning of the words employed by Congress in § 242(a) lead to the conclusion that the statute is concerned with the *appearance* of a respondent at future proceedings, and not whether the respondent will engage in employment while proceedings are pending.[25] While the INS argues that § 242(a) authorizes the agency to impose *any* conditions reasonably related to the "broad purposes" of the Act, Cert.Pet. 22, no words or phrases in § 242(a) mention anything about the "broad" purposes of the Act.[26]

Section 242(a) deals with release during deportation proceedings, while § 242(d) deals with release of persons found deportable and detained for six months thereafter. Under § 242(d), the Attorney General is clearly provided *additional* powers not mentioned in § 242(a). These include the power to require the alien "to conform to such reasonable written *restrictions on his conduct or activities* as are presecribed by the Attorney General." § 242(d) (emphasis added). Section 242(a), at issue here, does *not* contain similar authority to set bond conditions restricting the released person's "conduct or activities."[27]

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administrative interpretation is inapplicable." *United States v. Healey*, 160 U.S. 136, 40 L.Ed. 369 (1889).

[25] In fact, the statute contains none of the key words or phrases -- e.g. "employment," "work," "safeguarding employment opportunities for U.S. citizens," "compelling reasons for granting work authorization," etc. -- essential to explain INS's regulation.

[26] If INS can impose conditions of bond related to any of the "broad purposes" of the Act, it can virtually detain every alien without bond pending the outcome of deportation hearings. Every person charged with being deportable has allegedly violated one of the twenty (20) grounds of deportation, INA § 241(a), and each ground relates to a "broad purpose" of the Act. Thus bond could be conditioned on not receiving public assistance, 241(a)(15), not being institutionalized at Government expense because of a mental disability, 241(a)(3), not expressing certain political opinions, 241(a)(6), etc.

[27] The Petition states that "Congress could not have been more explicit in stating its intent to grant the Attorney General broad power to impose bond conditions." Cert.Pet. at 23. As we have just shown, if Congress intended the breadth INS now asserts, it would have said so precisely as it did in § 242(d) regarding the release on bond of persons already found deportable.

IV. The Legislative History of Section 242 Does Not Support INS's Interpretation Of The Statute

INA § 242(a) originated as Chap. 29, § 20 of the Immigration Act of 1917, as amended (8 U.S.C. § 156), which provided that "pending the final disposal of the case of any alien taken into custody," the alien could be released "under bond," with "security approved by the Attorney General and conditioned that such alien *shall be produced when required for a hearing . . . and for deportation if he shall be found to be unlawfully within the United States.*" Act of Feb. 5, 1917, Ch. 29, § 20, 39 Stat. 874, 891 (1917) (emphasis added).

By 1949, Congress found this language inadequate to deal with its increased concern over INS's inability to execute orders of deportation entered against subversives and aggravated felons. H.R. 10, a bill "Facilitating Deportation of Aliens" -- introduced in Congress in 1950 but *never* enacted -- provided in part:

> Pending final determination of the deportability of any alien taken into custody . . . such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General . . . It shall be among the conditions of any such bond . . . that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody . . . and for deportation if an order for his deportation has been made.

Pub.L. 831, 81st Cong., lst Sess. § 23, *reprinted in* 1950 U.S. Code Cong. Serv. 1006. The primary purpose of the proposed legislation was to address the situation of aliens who had been determined to be deportable but whose removal from the country had not been accomplished by the INS.[28]

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28 Of the six examples given in the House and Senate Reports, two were communist leaders who had been found deportable 18 and 21 years earlier; and four were criminals (two child molesters and two habitual

As Petitioners point out, Cert.Pet. 6, 23, the legislative history of H.R. 10 stated in part:

> These provisions, of course, enumerate only one of the conditions which is mandatory in the bond . . . This bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond . . *Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information . . .* The bill intends that the Attorney General shall have untrammeled authority to impose ***such*** conditions . . .

H.R. Rep. No. 1192, 81st Cong., 1st Sess., 6 (1949) (emphasis supplied); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950). The language regarding the Attorney General's "untrammeled authority" relates to release on bond *after a finding of deportability*. The examples immediately preceeding the "untrammeled authority" phrase are identical to the examples in the proposed statute dealing with persons already found deportable, not those awaiting hearings. In any event, the Supreme Court has specifically stated -- in response to an earlier attempt by the INS to rely on the "untrammeled authority" language in the history of H.R. 10 -- that "in carrying out [his bond authority under INA section 242], the Attorney General *is not left with untrammeled discretion* as to bail." *Carlson v. Landon*, 342 U.S. at 543 (emphasis added).[29]

As in the present law, H.R. 10 proposed to give the Attorney General *additional* authority as to aliens already found deportable. The Attorney General could require that they "conform to such reasonable written restrictions on their conduct or activities . . . as are prescribed by the Attorney General." 1950 U.S. Code Cong.Serv. 1006 (emphasis added). Clearly Congress knew how to use

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criminals). H.Rep. 1192, 81st Cong., 1st Sess. (1949) at 8-9; S.Rep. 2239, 81st Cong., 2d Sess. (1950), at 7-8.

29 The legislative history of subsequent bond statutes, unlike the reports accompanying H.R. 10, do not suggest that the Attorney General has "untrammeled" authority to set conditions of bond.

language granting the Attorney General the authority to impose "restrictions" on the "conduct or activities" of aliens released following arrest.

In 1950 Congress enacted § 23 of the Subversive Activities Control Act of 1950, Pub. L. 831, 64 Stat. 987, 1010 (1950), the precursor of § 242(a), "in order to provide more effective control over, and *to facilitate the deportation of*, deportable aliens." Conference Report accompanying the Subversive Activities Control Act of 1950, reprinted at 1950 U.S. Code Cong. Serv. 3911 (emphasis supplied). The 1950 statute provided in relevant part:

> Pending final determination of the deportability of any alien . . . such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General . . . It shall be among the conditions of any such bond : . . that the *alien shall be produced, or will produce himself, when required to do so* . .
>
> If deportation has not been . . . possible . . . within six months from the date of the order of deportation the alien shall become subject to such further supervision . . . Such regulations shall require any alien . . . (4) to conform to such *reasonable written restrictions on his conduct or activities* as are prescribed by the Attorney General in his case.

Pub.L. No. 831, 81st Cong., 1st Sess. § 23, *reprinted in* 1950 U.S. Code Cong. Serv. 1006 (emphasis added). It is clear that in § 23 Congress was concerned with the *appearance* of persons for deportation hearings and eventual removal from the country, not with their employment or lack thereof. Again, as in H.R. 10 and in the present law, Congress distinguished between those in hearings -- i.e. Respondents and their class members -- and those already found deportable. Only as to the latter group did the statute grant authority to impose bond conditions regarding their post-release "conduct or activities." The Petition avoids this important distinction entirely.

These provisions in § 23 were incorporated with minor changes into the 1952 Act, and remain as INA § 242 today. Ch. 477, 66 Stat. 163 (1952). The legislative history of the 1952 Act adds little to this analysis. The House Report simply states that "this provision [§ 242], in general, follows the procedure established by § 23 of the Subversive Activities Control Act of 1950." H.R. Rep. 1365, 82d Cong., 2d Sess. 57 *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1711; S. Rep. No. 1137, 82d Cong., 2d Sess. 30 (1952). As already pointed out, the "procedure" under the 1950 Act only granted the Attorney General power to impose broad restrictions on the activities of persons released from detention *after* being found deportable. This distinction remains in the law today. *Compare* § 242(a)with § 242(d).

V. Neither Judicial Nor Administrative Authorities Support INS's Blanket "No Work" Bond Condition

The court of appeal allowed INS wide discretion in detention matters, holding that the Attorney General has "broad power," App. 22a, and concluding that the regulations "must be upheld if they are founded on 'considerations rationally related to the statute [the Attorney General] is administering.'" *Id.* 24a (citation omitted).

A. Judicial Precedent: Relying on *Carlson v. Landon, supra*, the INS insists it has authority to impose blanket bond conditions relating to employment. *Carlson* approved detention of alien communists under the Internal Security Act of 1950. The Court held such detention permissible only because national security was at stake and it had been shown that the *individual* detainees were Communist Party members who had indoctrinated others -- the specific detainees were "a menace to the public interest." *Id.* at 541.[30] The Court pointed to evidence *in each instance* of "membership plus personal activity in supporting and extending the [Communist] Party's philosophy concerning violence" which justified the decision to

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[30] The Attorney General may detain a communist alien without bond *only* if he reasonably believes that the alien "may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement . . ." *Id.*, at 544.

detain. *Id.* at 541. The Court specifically noted that not *all* persons arrested as communists were denied bail. *Id.* at 541-42.

The *Carlson* Court confirmed the traditional requirements considered in setting bond in deportation cases:

> The discretion of the Attorney General . . . is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

Id. at 540. In carrying out his bond authority, the Attorney General *"is not left with untrammeled discretion* as to bail." *Id.* at 543 (emphasis added).

Rubenstein v. Brownell, 206 F.2d 449 (D.C.Cir. 1953), *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954), held that the exercise of discretion must be a reasonable one, *id.* at 445, and that where the alien was *not* dangerous to society and there was no suggestion that he would flee or hide, the Attorney General could *not* detain him. *Id.* at 456.

Five years after *Carlson*, in *United States v. Witkovich*, 353 U.S. 194 (1957), this Court reviewed the scope of § 242(d), concerning detention or release of "any alien against whom a final order of deportation . . . has been outstanding for more than six months." *Id.* In *Witkovich* INS, *inter alia*, restrained an alien from employment pending deportation pursuant to § 242(d). As in this case, the Attorney General argued in favor of the "eloquent breadth" of § 242, seeking the "broadest possible" discretion to impose bond conditions. 353 U.S. at 198. This Court rejected the claim:

> [O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words [of § 242(d)] become operative . . . *The preoccupation with the entire subsection . . . is certainly with availability for deportation* . . . When Congress did want to deal with the far-flung interest of national security or the general

> undesirable conduct of aliens, it gave clear indication of this purpose, as in § 242(e) . . . *[I]t is permissible and therefore an appropriate construction to limit the statute to . . . all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens.*

Id. at 199-202 (emphasis added).[31] The INS could hardly enjoy greater power over persons it has proved neither aliens nor deportable than it enjoys over aliens ordered deported following a due process hearing.

As the court of appeal stated below, "[f]rom these cases emerges an unmistakable emphasis *on the situation of each individual* as the focus of the exercise of discretion." App. 32a (emphasis added).

B. Administrative Precedent: Prior to the promulgation of the "no-work" regulation, employment or the prospect of employment, whether INS "authorized" or not, had generally been considered by the Attorney General a positive factor in determining the conditions under which to release aliens from detention. App. 34a; *Matter of Patel*, Interim Dec. No. 2491 (BIA 1976) (Board of Immigration Appeals considered the alien's unauthorized employment a *positive* factor contributing towards the likelihood of his future appearance in deportation proceedings). Detention was not considered a permissible response to unauthorized employment. *Matter of Toscana-Rivas*, 14 I&N 523, 539, 542, Int.Dec. # 2256 (1973). Even the INS "emphatically disavow[ed]" any intention of detaining aliens who worked without authorization. *Id.* at 542. The Attorney General found that employment-related conditions were acceptable during the six month period *after* deportability was established in "cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security." *Id.* at 556 (emphasis added). Furthermore, the

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31 While *Witkovich* involved an alien under a "final order of deportation," this case involves persons awaiting the outcome of deportation proceedings. The statutory authority relied upon by Petitioners here -- § 242(a) -- grants *less* discretionary powers to the Attorney General than the powers granted in § 242(d).

Attorney General required an individualized showing, something absent from the blanket prohibition at issue here.[32]

In conclusion, as the Court of Appeals determined, all relevant judicial and administrative authority suggests that INS's challenged interpretation of INA § 242(a) is improper.

VI. The INA Nowhere Permits Indefinite Incarceration as a Control on Alien Employment

A. Pre-IRCA

Since 1952, Congress has amended the INA numerous times, including many provisions dealing with employment. However, it has never amended the detention provisions of § 242(a). While it is widely recognized that a "primary purpose in restricting immigration is to preserve jobs for American workers," *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984), Congress has never seen fit to enact a statute providing for the detention of aliens who become employed without INS authorization. In fact, as pointed out above, Congress has repeatedly enacted provisions allowing aliens to win relief from deportation or regularize their status *despite* previous or on-going unauthorized employment.

B. IRCA Limits Controls to Employer Sanctions

i. IRCA Clearly Distinguishes Threats to National Security From Employment Concerns

Under IRCA national security grounds for exclusion remain grounds which may not be waived in the course of legalization. 8 U.S.C. § 1255a(d)(2)(B)(ii)(IV). Provisions of the Act maintained by IRCA exclude Communists or others who advocate overthrow of the Government. § 1182(a)(28)(C), (D), (F).[33]

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[32] The Board has subsequently stated that it would only uphold an employment prohibition in a release bond when individualized information justified such a restriction. *Matter of Vea*, Interim Dec. #2890 at 5 (BIA 1981).

[33] This provision also continues to exclude "[a]liens who . . . the Attorney General knows or has reason to believe seek to enter the United States . . . to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(27).

In direct contrast, IRCA's legalization provisions specifically render inapplicable (not merely waivable at the Attorney General's discretion) the grounds for exclusion which govern aliens entering the United States for skilled or unskilled work without authorization. §§ 1255a(d)(2)(A), 1182(a)(14). IRCA continues the provisions which permit aliens to adjust their status to lawful permanent resident status regardless of prior unauthorized employment.[34]

The structure of the grounds of exclusion and provisions regarding regularization of status show that Congress did not consider unauthorized employment by individual aliens as the sort of danger to the nation posed by those threatening the national security.

ii. Congress in IRCA Approved "Employer" Sanctions, Not "Employee" Detention as the Means to Prevent Unauthorized Employment

IRCA is a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those workers and businesses which might be adversely affected by the law. *See Immigration Reform, supra.*, 14 J.Legis. at 42.

For ten years preceeding the IRCA Congress repeatedly grappled with different methods for controlling the employment of aliens.[35] Culminating these efforts, the IRCA adds 8 U.S.C. § 1324a, which, for the first time, penalizes employers who knowingly hire

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[34] Also, no alien may be found inadmissible on grounds concerned with becoming a public charge "if the alien demonstrates a history of employment [whether authorized or not] in the United States evidenecing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii).

[35] The IRCA, particularly as regards employer sanctions, builds upon Congress' earlier efforts. *See* 132 Cong. Rec. H9708 (1986) (remarks of Congressman Rodino); H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 51-56, *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5655-5660; S. Rep. No. 99-132, 99th Cong., 1st Sess. at 18-27. For a history of the successive bills, *see* H.R. Rep. No. 99-682(I) at 51-55.

undocumented aliens.[36] The structure, language and legislative history of the IRCA all illustrate that Congress intended to control alien employment exclusively through such sanctions.

iii. Congress (And the INS in Testimony Before Congress) Specifically Rejected the Approach Adopted by INS In Its "No-Work" Regulation

As the Court of Appeal stated, the "no work bond condition, and the detention of individuals who violate that condition, is the very type of employee deterrence mechanism which Congress rejected in IRCA." App. 45a.

Beginning in 1971, the House Judiciary Committee, under the chairmanship of Rep. Peter W. Rodino, Jr., later to become the primary House author of IRCA, held hearings on alien employment controls. During these hearings James L. Hennessey, Assistant to the INS Commissioner, testified as follows:

MR. RODINO. [During deportation proceedings] the fact that an illegal alien is a holder of a job or some employment, means that there is no such surveillance on the part of the Service or anybody that he won't be holding the job?

HENNESSEY He will undoubtedly continue. In fact, having still the right to go before the Board [of Immigration Appeals], *I don't think we could attempt or ask for any legislation that he not hold the job. We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him.*

Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No.

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36 *See* H. R. Rep. No. 99-682(I) at 45 ("The bill [IRCA] establishes penalities *for employers* . . .")(emphasis added); *Id.* at 46 ("Employers will be deterred by the penalties in this legislation...").

13, pts. 1-5, pt. 1 at 46 [emphasis supplied] ("1971 Hearings"). Thomas M. Pederson, INS District Director for Detroit, Michigan, similarly discounted detention as an employment control:

PEDERSON. I believe that we ought to impose a penalty against the alien to help stop him [from working].

RODINO. What kind of penalty would you impose on the alien?

PEDERSON. Well, *I do not feel that a fine or imprisonment is the answer* . . . It could be possible to deny administrative relief of some form....

1971 Hearings, pt. 3 at 919 [emphasis supplied]. In floor debates Congressman Rodino summarized that "[a]dditional penalties [against immigrant workers] would serve no useful purpose . . ." 1118 Cong. Rec. 30155 (1972).

The House of Representatives passed legislation adopting employer-sanctions provisions during both the 92nd and 93rd Congresses. H.R. 16188, 92nd Cong., 2d Sess. (1972); H.R. 982, 93rd Cong., 2d Sess. (1973). Though neither bill received Senate action, controlling employment exclusively through sanctions against *employers* would remain the approach of all succeeding bills, eventually to be adopted in the IRCA itself.

In the months leading up to the passage of the IRCA, Congress considered and rejected detention of *employees* as a control on unauthorized entry and employment. A witness before the Senate Immigration Subcommittee, Dr. Barry Chiswick, proposed "detention of the illegal worker" -- rather than employer penalties -- as the vehicle to deter unauthorized employment. S. Hrg. 99-273, at 44-45. Correctly noting that this idea was "not something new," *id.* at 56, Senator Alan Simpson, Chairman of the Committee and primary author of IRCA in the Senate, scored Mr. Chiswick's approach as being "politically harsh, . . . [and] unrealistic..." Id. Senator Simpson expressed his opposition to the detention proposal, stating that although it "pointed out that there are some very fascinating ways to present to the subcommittee what we should do about illegal immigration ... it was my thought, and the thought of the Select Commission, we ought to try the most humane one [i.e.

employer sanctions] first ... if we do not get that done, then we will go on to other methods ... [which today] are expressed out of frustration ..." *Id.*

In reporting the IRCA to Congress the House Judiciary Committee declared itself "convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess., at 46 *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, 5650. The Attorney General concurred: only through "employer sanctions" can the "entry of illegal aliens into jobs" in the United States "be addressed effectively." *Id.* at 105.[37]

iv. The Challenged Regulation Directly Conflicts With and Frustrates Exemptions Contained In IRCA

Formulating what it considered to be a balanced approach to the issue, Congress provided that aliens *without* work authorization hired at the time of or before the enactment of the IRCA may continue to be employed *without* penalty on the employer. H. Rep. 99-603(I) at 56; 8 C.F.R. section 274a.7 (the "penalties" of employer sanctions "shall not apply to the continuing employment of an employee who was hired prior to November 7, 1986"). While IRCA exempts hundreds of thousands of these "grandfathered" workers from the impact of employer sanctions,.INS's regulation makes *no* exemption for them at all.[38]

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[37] During senate floor debates on the IRCA, the notion of penalizing employees come up once again. Senator Orin Hatch spoke against the bill because it "penalizes the wrong group for [the] actions of [illegal] individuals..." 118 Cong. Rec. S16912 (1986). Senator Hatch argued that the employed aliens, not their employers, should be penalized. *Id.* at S16912-16913. He was the *only* senator to openly support penalties against employees. His views, never formalized into a proposed amendment to the bill, were rejected by Congress.

[38] Employer sanctions was also not intended to reach the employers of "casual hires," whatever the workers' immigration status. H.R. Rep. No. 99-682(I), at 57; U.S. Code Cong. & Ad. News 5661. Nor does the IRCA address self-employment or work by independent contractors, and such work is apparently exempt from sanctions. INS's "no-work" regulation makes no room for these exceptions to Congress' enactment regarding alien-employment control.

Not only has the INS promulgated regulations which exempt, *inter alia*, "grandfathered" employees from the workings of employer sanctions, 8 C.F.R. § 274a.2(b)(v)(iii)(E),(G), but , as noted above in the Statement of the Case, other federal agencies, including the National Labor Relations Board, have similarly taken into account the statutory exemptions. The NLRB's September 1, 1988, Memorandum GC-88-9 notes that "[t]he penalty provisions and verification requirements [of IRCA] do not apply to periods of employmentthat began on or before November 6, 1986. . . .[T]he applicable INS regulations [8 C.F.R. § 274a.2(b)(v)(iii)(E),(G)] provide that the 'grandfather' requirement of continuing employment is met where an employee is reinstated after a wrongful termination . . ." *Id. at 3.* Accordingly, "by ordering the normal remedies of reinstatement and backpay for discriminatees who are 'grandfathered' under IRCA . . . the Board would not be acting in conflict with immigration law or policy." *Id.* at 4.[39] Clearly INS's "no-work" regulation conflicts with the agency's own regulation on "grandfathered" unauthorized employees, as well as the approach adopted by the NLRB in reliance on IRCA and INS regulations.

Even a casual reading of Petitioners' disapproved regulations reveals an attempt to regulate employment specifically left unregulated by Congress. Though the INS may remain "frustrated" over

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[39] In *Del Rey Tortilleria, Inc and Local 76, International Ladies Garment Workers Union*, Case No. 13-CA-25033 (NLRB, Division of Judges, Dec. 7, 1988), the Board addressed the question whether "grandfathered" undocumented employees could be ordered reinstated under the National Labor Relations Act (NLRA) and in light of IRCA. The decision notes that INS's regulations enacted pursuant to IRCA provide that the "grandfather" requirement of continuing employment is met where the employee is reinstated after a wrongful discharge or pursuant to a settlement. Further, Congress stated IRCA's terms were not intended to "diminish in any way labor protections in existing law . . . In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term 'employee' [in the NLRA]." H.R.Rep. No. 1,000, 99th Cong., 2d Sess. 58 (1986). Based on the above, reinstatement was ordered in *Del Rey Tortilleria, Inc.*.

Congress' failure to enact *employee* sanctions, Senator Simpson, with the full support of President Reagan and both Houses of Congress, flatly rejected jailing workers as a means to control their employment.

VII. Petitioners' "No-Work" Regulation Raises Significant Constitutional Questions

A cardinal tenet of statutory construction is that whenever possible statutes should be construed so as to preserve their constitutionality. *United States v. Harris*, 347 U.S. 612, 618 (1954). INS's "no work" bond regulation raises significant consitutional questions which the district court would be required to address if this Court reverses statutory decision..

For an individual who cannot comply the INS's terms for release, a no-work bond condition means *indefinite* detention -- the deprivation of all personal liberty.[40] The due process guarantee governs all government deprivations of liberty. *E.g., O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (involuntary confinement of mentally ill); *Youngberg v. Romeo*, 475 U.S. 307 (1975) (involuntarily committed persons retain a liberty interest in freedom of movement within the institution; *Addington v. Texas*, 441 U.S. 418 (1979) (individual may not be civilly committed based on a few isolated instances of idiosyncratic behavior).. Petitioners' regulation threatens severe injury -- loss of all personal liberty or the means to survive -- to achieve at best speculative results.[41] The INS failed to

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40 This, of course, is the one of the most fundamental of all constitutional rights, for if the "liberty" protected by the Due Process Clause of the Fifth Amendment means anything, it means freedom from physical restraint. *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977). Only an important governmental interest will justify infringing the right to be free from physical restraint. *Gernstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

41 The Government interest here is slight, if measurable at all. As we described in the Statement , *supra*, the unrebutted evidence establishes that INS's regulations would have *no* measurable impact on preserving jobs for U.S. workers, the primary interest asserted by the INS.

produce any evidence that its wishes cannot be realized by means less violent to personal liberty.

Turning to the procedural sufficiency of Petitioners' regulations,[42] in all the above-cases the Court, when it approved indefinite physical restraint, did so only because the individual confined had received a prior due process hearing.[43]

The Supreme Court has clearly stated that the detention provision (§ 23) of the 1950 Act must be read in light of the "due process [clause] of the Fifth Amendment." *Carlson*, 342 U.S. at 542. Due process would likely prohibit the Attorney General from promulgating a regulation under which "all persons arrested as deportable [aliens] under sec. 22 of the Internal Security Act .. . for communist membership are denied bail." *Id.*[44] This is such a case.

In *United States v. Witkovich*, this Court reviewed an employment prohibition imposed by INS against an alien under final order of deportation pursuant to § 242(d). The Court concluded that "[a]cceptance of the interpretation of Section 242(d) urged by the Government would raise doubts as to the statute's validity . . ." 353 U.S. at 200. INS's arguments in this case are the same ones they made in *Witkovich*. The same doubts are raised today about the constitutionality of the INS's interpretation of § 242(a).

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42 The INS is bound to accord procedural due process, particularly where it would deprive persons of personal liberty. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950).

43 *Addington*, 441 U.S. at 420 (jury trial "extended over six days" prior to committment); *O'Connor*, 422 U.S. at 565 (committment "[a]fter hearings before a county judge"). In the instant case, Petitioners admit that persons confined as a result of their regulations *never* receive a due process hearing.

44 Even as to the detention of alien communists, the Attorney General "must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543. The Attorney General may detain a communist alien without bond only if he reasonably believes that the alien "may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement . . ." *Id.* at 544.

CONCLUSION

The INS contends that its "no-work" regulation does no more than "fill [a] gap left by Congress." Appellants' Brief to Ninth Circuit at 25. INS has not just filled a "gap" left by Congress, they have themselves seized the legislative function, ruling by administrative decree who shall work and who shall not -- who shall be jailed indefinitely and who shall not. The INS, an agency daily embroiled in the business of law *enforcement*, is hardly better qualified than Congress when it comes to law *making* in this sensitive area of diverse national concern.

The Petition for Certiorari should be denied.

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MARCH 1991

(4)

No. 90-1090

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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H.R. Rep. No. 1192, 81st Cong., 1st Sess. (1949)	8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1090

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

In this nationwide class action, the court below has held invalid an important regulation issued by INS—a regulation requiring that when an alien is released on bond pending a determination of deportability, the bond contain a condition forbidding employment while the deportation proceedings are pending, unless the alien either shows that he falls within one of several statuses for which employment is authorized or obtains work authorization under a related regulation. Section 242(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1252(a)(1), provides that a release bond may contain "such conditions as the Attorney General may prescribe," and the primary question presented for this Court's review is whether the court below erred in holding that the regulation

exceeds the authority conferred on the Attorney General, and his delegate the INS, by this Section.

Although the respondents' brief in opposition buries the reader in a blizzard of verbiage, it does nothing to undermine the importance of this question or to explain why it does not warrant this Court's review. Indeed, most of the discussion does not require response at this stage, since it is directed not to the question whether the petition should be granted but to the merits of the underlying dispute.

1. *Jurisdiction.* The first question presented—whether the district court had subject matter jurisdiction—was included in the petition because, at the time of filing, *McNary* v. *Haitian Refugee Center Inc.*, No. 89-1332, had been argued before the Court and was awaiting decision. On February 20, 1991, the Court decided that case by affirming the decision below and upholding the district court's jurisdiction. 111 S. Ct. 888. In view of that decision, we withdraw the first question, and ask the Court to grant review limited to the second question presented in the petition.

2. *The merits.* With respect to the second question—whether the court below erred in invalidating the regulation—much of the brief in opposition is devoted to the issue whether the regulation precludes aliens released on bond from engaging in *any* employment (unless specific permission to work is obtained), or only from engaging in unauthorized employment. For two reasons, this issue is not one that should deter the Court from granting plenary review. First, any ambiguity in the regulation is resolved by INS's own explanation at the time the final regulation was issued—an explanation that clarifies the scope and purpose of the rule and that is entitled to deference. Second, and more important, the court

below left no doubt that its opinion did not turn on its construction of the rule. On the contrary, the court struck down the regulation on the basis of a narrow and insupportable reading of the Attorney General's statutory authority, under which even a condition strictly limited to the prohibition of unauthorized employment would clearly be proscribed.

a. At several points, *e.g.*, Br. in Opp. 9, 10, 13, 14, respondents suggest that the challenged regulation imposes a "no work" condition that can only be avoided by obtaining a specific determination from a District Director that employment is appropriate. This contention is contradicted not only by the regulation itself, which is directed at "unauthorized" employment, 8 C.F.R. 103.6(a)(2)(ii); Pet. App. 123a, but by the agency's explanation accompanying the final regulation, see 48 Fed. Reg. 51,143 (1983); Pet. App. 142a-143a. Thus, as stated in that explanation, "permanent resident aliens are not affected by these release conditions. Until such time as permanent resident status is lost, the permanent resident alien has the right to work in the United States, if released on bond. The Service, therefore, has no intention of applying this condition to a permanent resident alien in exclusion or deportation proceedings." *Ibid.* Moreover, "[a]liens who have applied for asylum [and who are governed by 8 C.F.R. Part 208] will not be affected by these regulations." *Ibid.* And, as explained in our petition, at 19-20, the condition will likewise not be applied to any alien who is entitled to work by virtue of any of a number of other statuses that automatically convey work authorization. See 8 C.F.R. 274a.12(a) and (b); Pet. App. 127a-132a.[1] Persons holding such

[1] Contrary to respondents' assertions, Br. in Opp. 8, work authorization conveyed by status, pursuant to these provisions,

statuses should, moreover, readily be able to prove that fact. See Pet. 19-20 & n.15. Thus, the true effect of the regulation is to shift to the apprehended alien the burden of showing that he is authorized to engage in employment. Furthermore, those aliens who cannot readily establish a pre-existing status conferring work authorization remain free, under the regulations, to apply for temporary work authorization pending the outcome of their deportation proceedings.[2]

As further explained in our petition, at 19 n.13, to the extent that the regulation itself is ambiguous, the court of appeals erred in rejecting INS's reading of it. This Court has on many occasions stressed the obligation of a reviewing court to defer to an agency's interpretation of its own regulation. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

b. If the only error of the court below had been its failure to give proper deference to the agency's reading of its regulation, the decision might not merit further review. Although that error does misconceive the appropriate relationship between an agency and a reviewing court, the harm to the agency's administration of the law could be corrected, at least prospectively, by revising the regulation to eliminate the perceived ambiguity.

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does not terminate upon the initiation of deportation proceedings. Only individual work authorizations previously issued pursuant to 8 C.F.R. 274a.12(c) are terminated under the provision respondents cite. See 8 C.F.R. 274a.14(a)(1)(ii).

[2] Respondents' supposition that there is no longer any provision under which aliens released on bond can apply for temporary work authorization, Br. in Opp. 14, is flatly incorrect. As we have explained previously, Pet. 7 n.4, the provisions of 8 C.F.R. 109.1 (1984) have merely been amended and recodified at 8 C.F.R. 274a.12(c)(13).

But the error of the court of appeals was much more fundamental. As both the court's ruling and respondents' brief reflect, the pivotal issue in this case is not the interpretation of the nuances of the existing regulations, but the delineation of the Attorney General's statutory authority. Respondents' discussion only reinforces the broad sweep of the ruling they attempt to defend.

While the lengthy decision below is not without its own ambiguities, it leaves essentially no doubt of the breadth of its rationale. The Attorney General, in the court's view, simply does not have authority to promulgate a regulation designed to prevent aliens in deportation proceedings from engaging in employment forbidden by law.[3] The major premise in the court of appeals' syllogism is that "[u]nauthorized employment has never been held to justify detention." Pet. App. 57a-58a;[4] see also *id.* at 48a. The court based this assertion largely on the fact that the Attorney General had not previously chosen to exercise his authority in this manner, Pet. App. 33a-37a, as well as on the (incorrect) notion that "detention to prevent unauthorized employment * * * runs contrary to the fundamental policy determinations made by Congress in enacting [the Immigration Reform

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[3] The only conceivable circumstance in which the court below might countenance any employment-related bond condition would be, as respondents note, Br. in Opp. 1, in the unlikely event that such a condition also bears a sufficient relationship to ensuring the alien's appearance at a future hearing or to protecting the public safety or national security. See Pet. App. 23a. Such a theoretical possibility hardly negates the court of appeals' stringent circumscription of the Attorney General's authority.

[4] Due to a printer's error, the bottom two lines at Pet. App. 57a are reversed. See 913 F.2d at 1374.

and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (IRCA)]." Pet. App. 47a. The court of appeals then went on to hold, based on an erroneous reading of prior case law,[5] that, "where there is no power to detain, [bond] conditions *must* be related to ensuring the alien's appearance." Pet.

[5] Like respondents, the court of appeals relied significantly on this Court's decision in *United States* v. *Witkovich*, 353 U.S. 194 (1957), to support its conclusion that, even in the face of broad statutory language, bond conditions necessarily "must be related to ensuring the alien's appearance for deportation." Pet. App. 51a; cf. Br. in Opp. 20. *Witkovich* is inapposite, however, because it involved a different provision of the INA, 8 U.S.C. 1252(d), which authorizes the Attorney General to require aliens under order of deportation to supply information concerning their activities. In placing a limiting construction on that authority, this Court noted that Section 1252(d) powers might be exercised indefinitely, whereas Section 1252(a) powers are necessarily limited by the duration of deportation proceedings. See 353 U.S. at 201 (distinguishing *Carlson* v. *Landon*, 342 U.S. 524 (1952)). Moreover, *Witkovich* also relied on constitutional doubts that would be raised by a broader construction of the authority in question; no similar doubts can be raised here: Congress has already forbidden aliens to engage in unauthorized employment, 8 U.S.C. 1182(a)(14), and the regulation merely seeks to add an additional disincentive to such illegal employment.

While respondents also attempt to rely on *Carlson* v. *Landon*, Br. in Opp. 19-20, that case likewise lends no support to their efforts to limit the Attorney General's authority under Section 1252(a). On the contrary, in *Carlson* the Court upheld the discretion of the Attorney General to exercise that authority to detain alien members of the Communist Party, without bail, pending deportation proceedings. In so doing, the Court rejected the very argument respondents make here, that the *only* proper purpose of detention pending deportation proceedings is to ensure the alien's later appearance. See 342 U.S. at 533-534.

App. 54a (emphasis added). Taken together, these two conclusions make clear that, in the court of appeals' view, the Attorney General has no discretion to bring his authority under 8 U.S.C. 1252(a) to bear on the problem of unauthorized employment by aliens awaiting the conclusion of deportation proceedings.

Despite respondents' invocation of the supposed ambiguity of the regulations as a reason for denying review, Br. in Opp. 13-14, they make no effort to dispute the sweeping nature of the court of appeals' statutory ruling. On the contrary, respondents' lengthy arguments in favor of restricting the Attorney General's statutory discretion repeatedly reflect the court of appeals' view that he may not use his authority under Section 1252(a) even to prevent "unauthorized employment" by aliens during the pendency of deportation proceedings. See, *e.g.*, Br. in Opp. 21, 23, 27. They also argue that Congress's decision, in IRCA, to add only employer sanctions regarding employment somehow "exempts" aliens engaged in illegal employment even from pre-existing statutory provisions. *Id.* at 27-28.

For reasons set forth in our petition, at 17-28, we strongly disagree with such arguments, and with the sweeping result to which they led the court below. The language of the INA is plain, affording the Attorney General broad discretion to impose "such conditions as [he] may prescribe" on release bonds. 8 U.S.C. 1252(a)(1). Nothing in any of this Court's decisions,[6] the legislative history of the INA,[7] or the

[6] See note 5, *supra*.

[7] While we do not intend to refute every point in respondents' lengthy analysis, one particularly misleading quotation warrants mention. In discussing the legislative history of the predecessor of Section 1252, respondents quote a com-

language of IRCA [8] serves to restrict that discretion as the court below has done. But for present purposes, the crucial point is that the validity of that regulation is a question vital to the effective administration of the immigration laws, and since the regulation has been invalidated in a nationwide class action, the question is one deserving of immediate Supreme Court review.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted, limited to the second question presented for review.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARCH 1991

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mittee report citing several examples of conditions that might be imposed, followed by the statement that "the Attorney General shall have untrammeled authority to impose *such* conditions . . . ." Br. in Opp. 17 (quoting H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949) (emphasis and ellipsis by respondents)). In truth, the passage in question refers to the Attorney General's "untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond * * *"—thus fully supporting our reading of the statute.

[8] As noted in our petition, at 24-25, IRCA does not address the issue of release on bond, or the conditions that may be attached to such release. Indeed, while IRCA constituted a carefully crafted compromise designed to take *new* steps to prevent illegal employment of aliens, the statute made no effort to modify existing provisions of the immigration laws, or to eliminate any steps available under those existing provisions to curb unlawful employment.

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ON WRIT OF CERTIORARI TO THE
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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 7, 1991
CERTIORARI GRANTED APRIL 1, 1991

6 PP

In the Supreme Court of the United States

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JOINT APPENDIX

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* The opinions and judgments of the district court and of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced herein.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-7927-KN (JRx)

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC.,
ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE,
ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
12/6/83	1.	Cplt. Issd sums.
		Case may be ref for disc to Mag Reichmann.
	2.	Memo of P/A in supp of appl for TRO.
	3.	Appl for TRO.
		LODGED TRO.
	4.	Exhibits in sup of plfts appl for TRO.
	5.	Declar of Peter A. Schey re serv of pltfs appl for TRO on counsel for dfts.
12-7-83	6.	Subm. as req by crt. Plaintiff
12-8-83	7.	ORD denying pltfs appl for TRO & setting hrg on prelim inj for 12-16-83, 11am.
*12-6-83	8.	MO: Ex parte appl for TRO argued & taken under subm.
*12-7-83	9.	Opp. to pltfs TRO. Defendant

DATE	NR.	PROCEEDINGS
	10.	MO: Appl for TRO will not be rule on until 12-8-83.
12/12/83	11.	Opp to pltfs motn fr prelim inj. Defendant
12/13/83	12.	REply breif. [sic] Plaintiff
12-16-83	13.	1st AMENDED COMPLAINT
12-15-83	14.	Ex Parte application to limit witnesses. defts
12-16-83	15.	Prelim Inj Hrng: Fld jury & witness list. MO
	16.	Supplemental exhibits in support of pltf's motn for prelim inj. PLTFS
12-16-83	17.	ORD re prelim inj, pltfs; motn granted & as further stated.
12-20-83	18.	Appl for stay of prelim inj pending appeal. Defendant
12-21-83	19.	ORD denying appl for stay.
1-4-84	20.	Fld defts' NOTC OF APPEAL to 9th Cir. C/A frm Ord dtd 12-16-83.
1-12-84	21.	Ex parte appl & ORD extg ti to file prop findings. Plaintiff
1-17-84	22.	Trans desig.
1-30-84		LODGED pltfs prop findings.
2-2-84	23.	Defts' objections ot [sic] prop findngs of fact & conclusions of law.
2-6-84	24.	Stip & ORD to ext ti to resp to 1st a/c to 2-13-84.
1/30/84	—	Fld orig of reptr's transc of prcdgs had on 12/16/83. Vol. 2. 12/ 6/83 [sic] Vol. 1.
2-13-84	25.	MO: Crt request pltf to submn prop findngs by 2-27-84.

DATE	NR.	PROCEEDINGS
2-21-84	26.	Notc & motn to dismisd compln; memo of p's & a's; 3-19-84, 9:30am. defts
3/6/84	27.	Appellants' designatn of Clerk's recrd on appeal. Deft
3-9-84	28.	Defts' objections to 2nd set of prop findngs of fact. defts
3-19-84	29.	Notc & motn for class certification, 4-16-84, 9:30am. pltfs.
		LODGED findngs & concl.
	30.	Memo of p's & a's in suppt of motn for class certification.
3/20/84	31.	Hrng on deft's Motn to dism & Hrng for pltf's Motn for class cert 4/16/84 at 10a.m. Oppos to motn fld 4/4/84 & reply due 4/11/84.
4-4-84	32.	Defts' oppos to pltfs motn for class cert.
*3/28/84	33.	Fld appellee/pltfs desig of clk's recd (CA 84-5504).
*3/8/84		LODGED cc frm USCA denying mot for partial stay pending appeal.
4/9/84	34.	Fld pltf's Oppos to deft's Mot to Dismiss 4/16/84 10am.
4/17/84	35.	MO: (DVK) On 3/19/84, pltfs fld fr the second ti proposd fndngs of fact & concl of law pursuant to crt's request as orig fndngs & concl were not acceptable. Crt hereby requests, for the final ti, that plts file proper findngs of fact & & [sic] concl by 4/27/84. Crt requests that pltfs prep third set of fndngs & concl in conformity w/Crt's Ord grntng prelim inj. Pltfs are to delete all arguments not addressed by Crt in its ord.

DATE	NR.	PROCEEDINGS
5/10/84	36.	Deft's reply to pltf's resp to deft's motn to dismiss.
5/11/84	37.	Pltf's reply to deft's opos to Motn for class certification.
5/14/84		—LODGED pltf's proposed findings of fact & conc of law (3rd set).
5/14/84	38.	MO: (Kn) Crt takes motn of deft's to disms comp & Pltf's motn fr class certicatn Under submisn.
5/14/84	39.	Notc of pltf's cnsl re new address.
5/17/84	40.	Deft's objctns to the 3rd set of propsd findings of fact & concl of law.
5/18/84	41.	Deft's resp to citations.
5/30/84		—Issd & fwd to C/A 1 cc of clk's recd o-n appeal along w/ reptr's transc of procdngs had on 12/6/83; 12/16/83; and one env containing exh.
7-3-84	41.	ORD DEN deft's mot to dism; pltf's mot fr class cert DEN w/o prej
9-4-84	42.	ANS TO 1ST A/C defts
9-5-84	43.	EX PARTE applic & ORD allowng defts to flg memo of P & A in excess of 35 pgs
9-7-84	44.	Notc & mot fr S/J 10-1-84 @ 9:30 AM defts
		LODGED STMT UNCON FACT & concl of law
		LODGED prop S/J
10-2-84	45.	Applic fr cont of hrg dte of deft's mot to dism & ORD cont hrg to 11-19-84 @ 9:30 AM pltf
11-15-84	46.	EX PARTE applic & ORD cont hrg on deft's mot fr S/J to 12-10-84 @ 9:30 AM pltf

DATE	NR.	PROCEEDINGS
11-20-84	47.	Opp to mot fr S/J pltf
12-5-84	48.	Pltf's renewd mot fr class cert; notc of mot 1-14-85 @ 9:30AM
12-5-84	49.	Pltf's ex parte applic fr cont of deft's mot fr S/J DEN
12-6-84	50.	Pltf's stmt of gen issues
12-10-84	51.	Crrctn to defts' resp to pltfs' stmt of genu issus
12-7-84	52.	Defts' reply memo
12-10-84	53.	Defts' resp to pltfs' stmt of genu issus
12-11-84	54.	Crt ORD tks mtn und subm MO
12-19-84	55.	Stip & ORD tht defts' resp to pltfs' renewd mot fr class cert may be fld by 1-4-85 defts
1-4-85	56.	Opp to pltf renewed mot fr class cert defts
2-20-85	57.	Pltfs' reply to defts' opp to pltfs' renewed mot fr class cert 2-25-85 @ 9:30 AM
3/7/85	58.	ORDER that Summary Judgment is granted in favor of the plaintiffs. (ENT 3/7/85) Mld cpys & Notc to ptys.
3-27-85	59.	MIN ORD: Crt intends to close this case; if eithr pty objcts such objects be submittd by 4-8-85
4-8-85	60.	Pltf's objs to closing of case
4-9-85	61.	Defts resp to pltfs prop findings of fact & conditions of [sic] law.
4-9-85	62.	Exh in suppt of Pltfs objections to closing of case. PLtf.
5/2/85	63.	Deft's NOTC OF APPEAL to 9th Cir. C/A frm ord ent 3/7/85.

DATE	NR.	PROCEEDINGS
5-6-85	64.	Notc of hrg on flg & spreading jgmnt USCA on 5-20-85 @ 9:30 AM
4/30/85		LODGED cc ord frm 9th CCA affirmng in part, revrsng & remdnging in part jdmt of DC.
5/20/85	65.	MO; CRT GRTS pltf's mot for class cert-fctn; pltf to prep ord by 5/25/*5 [sic].
5-24-85		LDOGED [sic] prop ord granting class certif-pltf
*5-20-85	66.	MIN ORD: Crt ORD mandate frm USCA affirm in part & reversing in part be fld & spread on min of USDC (ENT 5-28-85)
*4/30/85	67.	MO: Crt considers pltfs' objtns to closing of case, Ords pltfs' motn fr class certification shall be hrd 5/20/84 [sic], etc.
7/1/85	68.	Findings of Fact & Conclusion of Law (ENT 7/3/85) Mld copys/notcs
7/9/85	69.	ORD that Pltf motn for class certifictn is GRANTED; & case shall be closed upon final judgmnt being entered in favor of pltfs. Crt finds no need to stary [sic] proceedings as to other causes of actn in case; Crt hereby enters S/J to pltfs & closes case. (ENT 7/12/85) Mld copys/notcs. MD-JS-6
7/23/85	70.	Deft INS' NOTC OF APPEAL to 9th Cir. C/A frm ord ent 7/12/85.
8/7/85	71.	Memo in suppt of applictn for atty fees & costs; declrs & exhibits, 9/30/85, 9:30 am Pltf
	72.	Notc of motn for atty fees/costs, 9/30/85, 9:30 am Pltf
8/16/85		Transcript designt & Ordering Form

DATE	NR.	PROCEEDINGS
8/19/85	73.	Notc of motn to stay pltf motn for atty fees/costs; Memo of P/A Defts
8/16/85	74.	Trancpt desgntn & Ord Form
9/9/85	75.	On cts own motion, pltfs motion for fees & costs has been cont 10/7/85 9:30 am for further hearing
9/10/85	76.	Reply to pltfs opp to defts motion for stay. defts.
9/13/85	77.	LODGED cc ord fm 9th CCA exemptg case fm prebrief conf program
9/18/85	78.	Pltf's suppl decl in opp stn to dft's mtn to stay pltf's mtn for atty's fees & costs. Declrtn of Rev. Mark Valdes
9-23-85	79.	Pltfs Ex Parte applctn to file a suppl declrtn in opp to dft's mtn to stay pltf's mtn for atty's fees & costs, and memo & declrtn in supp therof
9-23-85	80.	ORD allowing pltfs to file a supplmntl dclrtn in opp. to pltf's mtn for attys' fees & costs.
10-2-85	81.	Stip & ORD that pltfs' mtn for atty's fees is w/d & may be resubmitted after the appellate process in this case is completed. 10-7-85 hrg date is therefore cancelled.
10-25-85	82.	Amded transcript desig & ordering form
11-4-85	83.	Appellants' desig of clerk's record on appeal.
11-22-85	84.	fild [sic] rptr's transc of proceeds for 12-6 & 16, 1983.
12-23-85		LODGED Ord appellees' mtn for ext of ti is Granted to 12-16-85.
*12-18-85	85.	Appellees' desig of Clerk's record on appeal.

DATE	NR.	PROCEEDINGS
2-7-86		LODGED Ord frm 9th Cir Crt of Appeals that appelt's mtn of ext of ti is grntd. Reply shall be fieled [sic] by 1-21-86.
2-19-86	86.	Fwd to 9th Cir C/A Org Reptrs trans of procdngs had 12-06-83 & 12-16-83
11-25-85		LODGED ord frm AP/ re applInt's motn of 10/10/85 for an ext of ti to 10/30/85 in which to file opening brief is granted.
7-11-86	87.	Notc. of mtn & mtn for affy [sic] fees, 9-22-86 at 9:30 a.m. pltf
		LODGED prop ord
	88.	Memo of P&A's. pltf
8-15-86	89.	Stip & ORD mot for atty's fees cont until 60 days after appellate process complt, matter cont to 12-1-86.
10-6-86		LODGED ORD from US 9th Cir C/A.
10-14-86	90.	MO: Flg & spreading mandate of the 9th C/A affirming the judgmnt. (ENT 10-17-86)
11-21-86	91.	STIP & ORD that mot for atty's fees cont to 1-26-87 @9:30am.
1-15-87	92.	STIP & ORD that mot for atty's fees will be taken off calendar.
6-8-87	93.	CRT ORD that mandate of 9th CCA remandg is fld & spread upon minutes of USDC. MO N/R (ENT 6-10-87).
7-7-87	94.	Crt asks ptys brief followg, what effect does the Immigration Reform & Control Act have on matter? & ptys should limit briefs to 20 pages & should fl it NLT 7-28-87 MO N/R

DATE	NR.	PROCEEDINGS
7-27-87	95.	Stip & ord—briefing due 7-28-87 now cont to 8-28-87
8-28-87	96.	Memo of P's & A's re immigration reform & control act of 1986. pltfs.
	97.	brief on remand of case. defts.
11-3-87		LODGED cc of ord from 9th CCA remanded jdmnt of dist crt.
12-31-87	98.	ORD that IRCA does not alter crt's earlier rulg, crt finds that S/J in favor of pltfs is warranted. (ENT 1-6-88) mld copies to ptys.
2/25/88	99.	DEFT'S NOTC OF APPEAL TO 9th CIR. C/A FRM ORD ENT 01/06/88. FEES WAIVED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5774

D.C. No. 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION & NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

DOCKET ENTRIES

DATE	PROCEEDINGS
3/4/88	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. (lu)
3/22/88	Filed as of 3/21/88 appellant's Civil Appeals Docketing Statement served on 3/18/88 (to CONFATT) [88-5774] (ru)
3/23/88	Filed notice of appearance of Barbara L. Herwig and John F. Daly as cnsl for aplts. [88-5774] (ec)
4/28/88	FILED CERTIFICATE OF RECORD; RT FILED IN DC N/T. [88-5774] [88-5774] [sic] (rc)
7/15/88	Referred to CONFATT re: briefing schedule. [88-5774] (jlc)

DATE	PROCEEDINGS
9/27/88	Filed order CONFATT (HAH) releasing case from CONFATT and setting briefing schedule. appellant's brief, excerpts due 11/7/88 for Alan Nelson, for INS [88-5774] (jw)
11/7/88	Filed motion of Appellant extend time to file appellant's opening brief and deputy clerk order: (Deputy Clerk: wqm) granting motion to extend time to file appellant's opening brief. The opening brief and excerpts of record are due November 28, 1988. Further briefing will be governed by FRAP 31(a). [412670-1] [88-5774] (jw)
11/25/88	Filed motion of Appellant extend time to file appellant's opening brief and deputy clerk order: (Deputy Clerk: wqm) granting motion to extend time to file appellant's opening brief. The opening brief and excerpts of record are due December 8, 1988. Aples' brief and aplts' reply brief shall be filed in accordance with the time limits set forth in FRAP 31(a). No further extension of time in which to file this brief will be entertained by this court. [1478414-1] [88-5774] (jw)
12/15/88	Filed original and 15 copies Appellant INS, Appellant Alan Nelson opening brief 50 pages, and five excerpts of record in 1 volumes [sic]; served on 12/8/88 [88-5774] (jlc)
1/19/89	Filed motion of Appellee extend time to file appellee's brief and deputy clerk order: (Deputy Clerk: ahh) granting motion to extend time to file appellee's brief. The answering brief is due February 9, 1989. The optional reply brief is due February 23, 1989. [1553746-1] appellees' brief due 2/9/89 for NCIR, for American Friends Com, for El Rescate, for United Automobile, for CARC, for El Concilio Manzo, for Willamette Valley; appellants' reply brief due 2/23/89 for Alan Nelson, for INS; [88-5774] (jw)

DATE	PROCEEDINGS
2/10/89	Filed motion of Appellee extend time to file appellee's brief and deputy clerk order: (Deputy Clerk: ahh) Aples' motion for an extension of time in which to file answering brief is granted. [1563498-1] appellees' [sic] brief due 2/21/89 for NCIR, for American Friends Com, for El Rescate, for United Automobile, for CARC, for El Concilio Manzo, for Willamette Valley; appellants' reply brief due 3/7/89 for Alan Nelson, for INS; (Motion recvd 02/07/89) [88-5774] (jw)
2/24/89	Filed original and 15 copies appellees' 49 pages brief, served on 2/21/78 [88-5774] (jw)
2/27/89	Filed International Human Rights Law Group's motion to become amicus curiae, (PROMO); served on 2/21/89 [1570673] [88-5774] (jw)
2/28/89	Received International Human Rights Law Group's orig brief in 15 copies of 11 pages; deficient: mtn. pending; served on 2/21/89 Notified counsel. [88-5774] (jw)
3/10/89	Filed Appelalnt INS's motion to extend time to file reply brief (PROMO) [88-5774] served on 3/1/89 [1575621] [88-5774] (jw)
3/13/89	Filed order (NOONAN): The motion of the International Human Rights Law Group to file a brief as amicus curiae in support of aples is granted. The brief received February 28, 1989, shall be filed March 22, 1989. Aplts' motion for an extension of time in which to file the reply brief is granted. the [sic] reply brief is due March 22, 1989. [1570673-1] [1575621-1] appellants' [sic] reply brief due 3/22/89 for Alan Nelson, for INS; [88-5774] (jw)
3/13/89	Filed original and 11 copies amicus curiae (INTERNATIONAL HUMAN RIGHTS LAW GROUP) brief of 11 pages; served on 2/21/89, previously received. [88-5774] (jw)

DATE	PROCEEDINGS
3/16/89	INVENTORIED [88-5774] (mm)
3/24/89	Filed motion of Appellant extend time to file reply brief and deputy clerk order: (Deputy Clerk: ahh) granting motion to extend time to file reply brief. The reply brief is due March 28, 1989. [1581544-1] appellants' [sic] reply brief due 3/28/89 for Alan Nelson, for INS; (Motion recvd 3/21/89) [88-5774] (jw)
3/29/89	Filed original and 15 copies INS, Alan Nelson reply brief, 25 pages, served on 3/28/89 [88-5774] (jw)
6/15/89	Filed order (Deputy Clerk: dd) Judge Trott has been drawn to replace Judge Wright on this case. The panel is now circuit Judges Ferguson, Reinhardt, and Trott. [88-5774] (jw)
8/8/89	CALENDARED: Pasadena 9/19/89 1:00 p.m. Courtroom 1 [88-5774] (dd)
9/19/89	ARGUED AND SUBMITTED TO: FERGUSON, REINHARDT, TROTT [88-5774] (lu)
10/6/89	Received letter from Barbara L. Herwig, Esq. & John F. Daly, Esq. dated 10/5/89 re: wording of certain bond conditions, (PANEL) [88-5774] (jw)
11/9/89	Filed aple's letter dtd 10/24/89 re: question from Judge Trott w/suggestion re: lack of jurisdiction and appropriateness of dismissal and supporting memorandum of law. (Panel) (10/24) [88-5774] (dmd)
11/27/89	Received aplt's response to aples' suggestion of lack of jurisdiction. (11/24) (PANEL) [88-5774] (jlc)
12/21/89	Filed per curiam opinion (Judges FERGUSON, REINHARDT, TROTT) The suggestion raised by aples of want of jurisdiction and appropriateness of dismissal is hereby rejected. [88-5774] (jlc)

DATE	PROCEEDINGS
1/5/90	Corrected reprint 1/5/90 removing the argued and submitted date from the 12/21/89 opinion. [88-5774] (dt)
5/23/90	Received letter from John f. [sic] Daly, Esq. dated 5/18/90 re: change in phone numbers for John Daly, Esq. (FTS 368-2541/(202) 514-2541) and Barbara L. Herwig, Esq. (FTS 368-5425/(202) 514-5425) [88-5774] (jw)
6/27/90	Received letter from John F. Daly, Esq. dated 6/19/90 re: additional citations, (PANEL) [88-5774] (jw)
7/6/90	Received letter from John F. Daly, Esq. dated 7/2/90 re: additional citations, (PANEL) [88-5774] (jw)
9/7/90	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. FERGUSON, author; REINHARDT; TROTT, dissenting.) FILED AND ENTERED JUDGMENT. [88-5774] (dmd)
9/25/90	Filed Appellant INS, Appellant Alan Nelson's motion for leave to file out of time a motion for extension of time within which to file petition for rehearing. (PANEL w/motion for extension of time to file petition for rehearing) [88-5774] served on 9/24/90 [1817604] [88-5774] (jw)
10/1/90	Filed aples' response in opposition to appellant's motion for leave to file late petition for rehearing, (PANEL) [1817604-1] served on 9/26/90 [88-5774] (jw)
10/12/90	[1824662] Received original and 40 copies Appellant INS, Appellees' petition, for rehearing with suggestion for rehearing en banc. (motion [sic] for leave to file out of time a motion for extension of time to file petition for rehearing is pending) (shelf) served on 10/11/90. Notified counsel. (jw)

DATE	PROCEEDINGS
10/25/90	Filed order (FERGUSON, REINHARDT, TROTT): The motion for leave to file out of time a motion for extension of time within which to file Petition for Rehearing is denied. [88-5774] (jw)
11/6/90	MANDATE ISSUED [88-5774] (jw)
11/29/90	Received letter from U.S. Supreme Court dated 11/23/90 re: "The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on November 23, 1990, signed an order extending the time to and including January 5, 1991. [88-5774] (jw)
12/12/90	Received letter from Peter A. Schey, Esq. dated 12/5/90 re: notice of change of address. [88-5774] (jw)
12/28/90	Filed NCIR motion for transfer of consideration of attorneys' fees application, (PANEL) served on 12/23/90. [88-5774] served [sic] on 12/23/90 [1860554] (jw)
1/15/91	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 90-1090 filed on 1/7/91. [88-5774] (jw)
2/14/91	Filed order (FERGUSON, REINHARDT, TROTT): Plaintiffs/Aples' motion for transfer of Consideration of Attorneys' fees application is granted. [1860554-1] [88-5774] (jw)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 83 7927 Kn (JRx)

NATIONAL CENTER FOR IMMIGRANTS [sic] RIGHTS, INC.; AMERICAN FRIENDS SERVICE COMMITTEE; EL RESCATE ("THE RESCUE"); UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 645; CENTRAL AMERICAN REFUGEE CENTER (CARECEN); EL CONCILIO MANZO; WILLAMETTE VALLEY IMMIGRATION PROJECT;) [sic] THE SOUTHERN CALIFORNIA ECUMENICAL COUNCIL; CENTRO PRESENTE, INC.; TUCSON ECUMENICAL COUNCIL; HERMANDAD NACIONAL MEXICANA; COALITION FOR VISAS AND RIGHTS FOR THE UNDOCUMENTED; CENTRO PARA IMMIGRANTES DE HOUSTON; INTERNATIONAL INSTITUTE OF BOSTON CENTER FOR IMMIGRANTS RIGHTS, SANTOS DURAN; JULIO FERNANDO LORINE-GARCIA; JOSE SALAZAR GUARDADO; RAPHAEL ANTONIO PEREZ; RAUL ARMANDO MARROQUIN; RICARDO OSEGUEDA IMPERIAL VALLEY IMMIGRATION PROJECT; PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; ATTORNEY GENERAL WILLIAM FRENCH SMITH, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (CLASS ACTION)

[Filed Dec. 6, 1983]

I

INTRODUCTION

1. This complaint challenges the implementation of a national regulation by the defendant Immigration and Naturalization Service ("INS") which becomes effective on December 7, 1983, and requires "the imposition of bond conditions against employment in the case of aliens who are placed in exclusion or deportation proceedings" by the agency. Federal Register, Vol. 48, No. 216, pages 51142-44 (November 7, 1983); 8 C.F.R. Sections 103.6 and 109.1 (1983). Placement of this condition on release from detention is automatic regardless of its relevance to ensuring the presence of the respondent at future administrative proceedings.

2. Holding that under the Immigration and Nationality Act, Section 242, 8 U.S.C. Section 1252, "there does not appear to be any reason . . . to limit conditions of release" of aliens, 48 Fed. Reg. p. 51142, and recognizing that under the regulation "more aliens might have to be detained," *Id.*, at 51143, the INS justifies the new restriction solely as a reasonable measure for the "safeguarding of employment of U.S. citizens . . ." *Ibid.*

3. The new regulation removes the power of administrative Immigration Judges to set the conditions of bond of persons in deportation and exclusion proceedings over which the Immigration Judges preside. 8 C.F.R. Section 242.2. While the Immigration Judges are entirely independent of the INS, Federal Register, Vol. 48, No. 39, pages 8039-40 (February 25, 1983), 8 C.F.R. Section 3 (1983), coming under the jurisdiction of the Executive Office for Immigration Review, *Ibid.*, the regulation challenged herein, which significantly reduces the power of the Immigration Judges, was only proposed and made final under order of the INS Commissioner.

4. Under the new regulation a person released from detention by defendants may obtain "work authorization" only upon a showing of "compelling reasons." 8 C.F.R.

Section 103.6(a)(iii). The regulation does not provide for a due process hearing of any type, does not describe what type of form shall be used to make an application, and provides *no* time limits within which a request for work authorization must be responded to. *Ibid.* No appeal lies from the denial of an application for work authorization. *Ibid.*

5. As is more fully set forth below, plaintiffs allege that the challenged regulation is without statutory authority, is not reasonably related to the agency's statutory power to release persons on bond in a manner designed to ensure their presence at future proceedings, was promulgated unlawfully in that the INS Commissioner is without power to remove matters over which the independent Immigration Judges have jurisdiction, violates the due process clause of the Fifth Amendment in that no hearing is provided for before work authorization can be denied, and violates the Fifth Amendment's equal protection guarantee in that only indigent persons will be severely injured by the challenged regulation.

II

Jurisdiction and Declaratory Judgment

6. Jurisdiction for this action is had pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1361 (mandamus jurisdiction): 8 U.S.C. § 1324 (federal district court jurisdiction for disputes arising under the Immigration Act).

7. Declaratory judgment is sought pursuant to 28 U.S.C. § 2202.

III

Parties

8. The National Center for Immigrants [sic] Rights, Inc., is a non-profit, tax-exempt corporation dedicated to the protection and promotion of the rights of immigrants and refugees residing in the United States. Located in

Los Angeles, California, NCIR, Inc., represents indigent immigrants and refugees in proceedings before INS throughout the United States. NCIR, Inc. is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

9. The American Freinds [sic] Service Committee is a non-profit, tax-exempt corporation dedicated, *inter alia*, to the protection and promotion of the rights of immigrants and refugees residing in the United States. With offices throughout the United States, the AFSC represents indigent immigrants and refugees in proceedings before INS. AFSC is a membership organization. It has approximately 350 clients and members (including about 80 presently in INS detention) who will be irreparably injured unless implementation of the challenged regulation is enjoined.

10. El Rescate ("The Rescue") is a non-profit organization based in Los Angeles, California, which provides legal assistance to low-income immigrants and refugees. El Rescate is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

11. Plaintiff the UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 645, is a duly composed union in the United States with many immigrant and refugee members currently employed in this country and under contracts protected by the National Labor Relations Act and the National Labor Relations Board. Authoritative decisions issued by the National Labor Relations Board and various federal Courts of Appeal have held that undocumented immigrants and refugees are entitled to work in the United States and are eligible for the statutory protections of the National Labor Relations Act. The plaintiff union's members will be directly and unlawfully impacted by implementation of the INS regulations chal-

lenged herein. Duly authorized union members will be prohibited from working, including undocumented immigrant members who have recently won decisions from the National Labor Relations Board providing that they are entitled to work in the United States.

12. CARECEN is a non-profit, tax-exempt corporation based in Washington, D.C., which provides free legal assistance to low-income immigrants and refugees. CARECEN is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

13. The WILLAMETTE VALLEY IMMIGRATION PROJECT is a non-profit, tax-exempt corporation based in Oregon, which provides free legal assistance to low-income immigrants and refugees. The Willamette Valley Immigration Project is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

14. The EL CONCILIO MANZA is a non-profit, tax-exempt corporation based in Tucson, Arizona, which provides free legal assistance to low-income immigrants and refugees. The El Concilio Manzo is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

15. CENTRO PRESENTE is a non-profit, tax-exempt corporation based in Cambridge, Massachusetts, which provides free legal assistance to low-income immigrants and refugees. The Centro Presente is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

16. The SOUTHERN CALIFORNIA ECUMENICAL COUNCIL is a non-profit, tax-exempt corporation based in Los Angeles, California, which, *inter alia*, provides free legal assistance to low-income immigrants and refugees

through a project called EPIC. The Southern California Ecumenical Council has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

17. The TUCSON ECUMENICAL COUNCIL is a non-profit, tax-exempt corporation based in Tucson, Arizona, which, *inter alia*, provides free legal assistance to low-income immigrants and refugees through a project called EPIC. The Southern California Ecumenical Council [sic] has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

18. The CENTRO PARA IMMIGRANTES DE HOUSTON is a non-profit, tax-exempt corporation based in Houston, Texas, which provides free legal assistance to low-income immigrants and refugees. The Centro is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

19. The INTERNATIONAL INSTITUTE OF BOSTON is a non-profit, tax-exempt corporation based in Boston, Massachusetts, which provides free legal assistance to low-income immigrants and refugees. The Institute is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

20. The CENTER FOR IMMIGRANTS RIGHTS is a non-profit organization based in New York City, New York, which provides free legal assistance to low-income immigrants and refugees. The Center is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

21. The IMPERIAL VALLEY IMMIGRATION PROJECT is a non-profit organization based in El Centro, California, which provides free legal assistance to low-income immigrants and refugees in INS detention at the INS detention facility in El Centro, California. It

has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

22. Jose Salazar Guardado (A27 188 642), Santos Adalberto Lopez-Duran (A26 408 989), Julio Fernando Lorine-Garcia (A26 408 989), Rafael Antonio Perez (A26 967 632), Raul Armando Marroquin (A26 967 801), and Ricardo Delgado Oseguena (A24 267 349) are indigent immigrants held in detention by INS. On and after December 7, 1983, these plaintiffs' ability to win their release from detention will be almost non-existent because of the "no work" condition which will be placed on all bonds. These plaintiffs are also without the financial means to support themselves without the ability to be employment [sic]. Under the guidelines established in defendants' challenged regulation, the plaintiffs cannot establish a "compelling reason" to be employed (other than the need to eat, etc.) while INS processes their pending applications for benefits which might entitle them to lawfully remain in the United States. Like all other immigrants and refugees with applications for benefits pending before the Immigration Service, these plaintiffs need to be employed so that they can obtain the bare necessities of life (food, clothing, shelter, medical services, etc.) while INS adjudicates their applications for benefits, a matter which might take more than one year. Many of these plaintiffs also have children to support.

23. JANE DOE I is an immigrant who is currently in the process of preparing various applications for immigration statutory benefits and who intended to surrender to the INS and apply for such benefits in the coming weeks. Until December 7, 1983, this plaintiff could have surrendered to the INS to apply for benefits knowing that she would likely be released from detention under bond within a matter of hours or days. This plaintiff will not surrender to INS to seek statutory benefits on or after December 7, 1983, because she has become aware of the challenged regulation and is afraid that she will never win release from detention if she surrenders to INS once the challenged regulation is implemented.

24. Defendant the IMMIGRATION AND NATURALIZATION SERVICE is an agency of the Department of Justice and is responsible for implementing the Immigration and Nationality Act, 8 U.S.C. Sections 1101, *et seq.*

25. Defendant Alan Nelson is the duly appointed Commissioner of the INS and was the person responsible for the promulgation of the challenged regulation.

26. Defendant WILLIAM FRENCH SMITH is the Attorney General of the United States and is statutorily responsible for implementation of the Immigration and Nationality Act. 8 U.S.C. Section 1103.

IV

CLASS ACTION

27. Pursuant to Rule 23(a) and (b)(2), plaintiffs seek to have this case certified as a class action on behalf of all persons whose release from INS detention on or after December 7, 1983, will be conditioned by the no employment restriction found in the challenged regulations, 8 C.F.R. Sections 103.6 and 109.1.

28. Defendants' challenged regulation is or will be applied in a uniform manner to all persons in INS detention on or after December 7, 1983, and the issues of law and fact raised by plaintiffs and their proposed class members are identical. The number of class members is in the thousands and is too large to feasibly join in this action.

V

FIRST CAUSE OF ACTION

27. Plaintiffs incorporate herein by reference all proceeding [sic] paragraphs.

28. The INS has the statutory authority to arrest and detain persons reasonably believed to be aliens unlawfully present in the country. 8 U.S.C. Section 1252(a). The

Attorney General has the statutory discretion and due process obligation to release persons "under bond . . . containing such conditions as the Attorney General may prescribe . . ." *Ibid.*; 8 C.F.R. Section 242.2.

29. 8 C.F.R. Sections 103.6 and 109.1 (1983) are without statutory authority in that the broad prohibition against employment contained in these regulations is not reasonably related to ensuring the respondent's presence at future administrative hearings. Nor is the employment restriction reasonably related to any other legitimate governmental interest justifying the imposition of the restriction. The challenged regulations are arbitrary, capricious and an abuse of discretion.

VI

SECOND CAUSE OF ACTION

30. Plaintiffs incorporate herein by reference all proceeding [sic] paragraphs.

31. The INS Commissioner is without statutory authority to promulgate a final regulation which removes jurisdiction from the independent Immigration Judges on bond matters and places authority for such matters in the hands of INS employees of the Commissioner. Since February 1983 the Special Inquiry Officers have no longer been under the jurisdiction of the INS Commissioner, and now are directed in "the execution of their duties" by the "newly created" Executive Office of Immigration Review. Federal Register, Vol. 48, No. 39 (February 25, 1983) pages 8039 (amending 8 C.F.R. Section 3) and 8057 (amending 28 C.F.R. Section 0.19). 8 C.F.R. Section 3 (1983) and 28 C.F.R. Section 0.105 (1983) clearly withdrew the INS Commissioner's authority over Special Inquiry Officers. The Attorney General has only delegated to the INS Commissioner certain administrative functions, "except the authority delegated to the Executive Office for Immigration Review . . . [and] Special Inquiry Officers." 8 C.F.R. Section 100.2 (amended 1983)

(Federal Register, Vol. 48, No. 39, page 8040. [sic] The INS Commissioner's final regulation is unlawful and void.

VII

THIRD CAUSE OF ACTION

32. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

33. The employment prohibition contained in 8 C.F.R. Sections 103.6 and 109.1 violate [sic] the due process clause of the Fifth Amendment in that they [sic] seek to completely and totally restrict the exercise of an important liberty without the opportunity for notice and hearing and a due process proceeding of record.

VIII

FOURTH CAUSE OF ACTION

34. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

35. The employment prohibition contained in 8 C.F.R. Sections 103.6 and 109.1 violate [sic] the equal protection guarantee of the Fifth Amendment in that the loss of the right to be employed imposed by the regulations remains in effect for as long as the INS takes to process the immigrant or refugee's pending application(s) and, without regard to any difference in their circumstance concerning their likelihood of appearing in future administrative proceedings, adversely affects indigent people while not affecting similarly situated persons with financial resources.

IX

FIFTH CAUSE OF ACTION

36. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

37. Defendants' challenged regulation is inconsistent with and is superceded by federal laws which allow all

immigrants and refugees (other than those present in the country with non-immigrant visas) to be employed and to be eligible for the benefits of protective labor legislation. 29 U.S.C. Sections 141, *et seq.* (National Labor Relations Act); 29 U.S.C. 201-219 (Fair Labor Standards Act); 29 U.S.C. Section 651, *et seq.* (Occupational Safety and Health Act).

X

SIXTH CAUSE OF ACTION

38. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

39. Defendants have unlawfully failed to establish uniform standards and procedures to implement "work authorization" policies under existing policies and regulations (including 8 C.F.R. Sections 109.1(b)(2), 208.4), and have arbitrarily and capriciously denied work authorization, or failed to respond to requests for work authorization, without compliance with substantive or procedural Fifth Amendment due process and in a manner contrary to law.

XI

IRREPARABLE INJURY

40. Plaintiffs and the members and clients of the plaintiff organizations will suffer irreparable injury unless an injunction is issued prohibiting enforcement of the unlawful INS regulations challenged herein. This injury will include, *inter alia*, the inability of persons to bond out of detention pending lengthy administrative proceedings without regard to their likelihood to appear at future hearings, the forced abandonment of applications and petitions for important statutory benefits for lawful status due to indefinite detentions and the release of persons without affording them the opportunity to obtain the basic necessities of life, and the separation of families through unnecessary detentions.

XII

PRAYER FOR RELIEF

Wherefore, plaintiffs pray that this Court:

1. Assert jurisdiction over this complaint;

2. Issue a temporary restraining order prohibiting implementation of 8 C.F.R. Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8);

3. Issue a preliminary injunction prohibiting implementation of 8 C.F.R. Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8);

4. Issue a permanent injunction prohibiting implementation of 8 C.F.R. Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8);

5. Issue a declaratory judgment providing that 8 C.F.R. Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8) are without statutory authority, bear no reasonable relationship to respondents' future appearances at deportation proceedings, bear no relationship to any other legitimate government interest, violate the due process clause and the equal protection guarantee of the Fifth Amendment, and were promulgated in an unlawful manner in that the INS Commissioner has no jurisdiction over the Special Inquiry Officers;

6. Grant plaintiffs reasonable costs and attorneys fees;

7. Grant such further relief as the Court may deem just and proper.

DATED: December 5, 1983

By: /s/ Peter A. Schey
PETER A. SCHEY
Counsel of Record for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Date: Dec. 16, 1983

Time 10:30 a.m.

Case No. CV 83-7927-KN (JRx)

NATIONAL CENTER FOR IMMIGRANTS [sic] RIGHTS, INC.; AMERICAN FRIENDS SERVICE COMMITTEE; EL RESCATE ("THE RESCUE"); UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 645; CENTRAL AMERICAN REFUGEE CENTER (CARECEN); EL CONCILIO MANZO; WILLAMETTE VALLEY IMMIGRATION PROJECT;) [sic] THE SOUTHERN CALIFORNIA ECUMENICAL COUNCIL; CENTRO PRESENTE, INC.; TUCSON ECUMENICAL COUNCIL; HERMANDAD NACIONAL MEXICANA; COALITION FOR VISAS AND RIGHTS FOR THE UNDOCUMENTED; CENTRO PARA IMMIGRANTES DE HOUSTON; INTERNATIONAL INSTITUTE OF BOSTON CENTER FOR IMMIGRANTS RIGHTS, SANTOS DURAN; JULIO FERNANDO LORINE-GARCIA; RAPHAEL ANTONIO PEREZ; RAUL ARMANDO MARROQUIN; RICARDO DELGADO OSEGUEDA; MIRZA ODILIA HERNANDEZ DIAZ; MAXIMILIANO MARTINEZ ORIANA; ROSA MARIA TOVAR RIVAS; DENNIS GILLERMO VANEGAS; ANTONIO MENDOZA ROMERO; MIGEL ANGEL GOMEZ VASQUEZ; FIDEL ANGEL HENRIQUEZ DURAN; DANIEL ANTONIO GARCIA REYES; ANA BERTA MARTINEZ; DIONISIO NAVARETTE MARLOS; JANE DOE I; IMPERIAL VALLEY IMMIGRATION PROJECT, PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; ATTORNEY GENERAL WILLIAM FRENCH SMITH, DEFENDANTS

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (CLASS ACTION)

[Filed Dec. 16, 1983]

I

INTRODUCTION

1. This complaint challenges the implementation of a national regulation by the defendant Immigration and Naturalization Service ("INS") which becomes effective on December 7, 1983, and requires "the imposition of bond conditions against employment in the case of aliens who are placed in exclusion or deportation proceedings" by the agency. Federal Register, Vol. 48, No. 216, pages 51142-44 (November 7, 1983); 8 C.F.R. Sections 103.6 and 109.1 (1983). Placement of this condition on release from detention is automatic regardless of its relevance to ensuring the presence of the respondent at future administrative proceedings.

2. Holding that under the Immigration and Nationality Act, Section 242, 8 U.S.C. Section 1252, "there does not appear to be any reason . . . to limit conditions of release" of aliens, 48 Fed. Reg. p. 51142, and recognizing that under the regulation "more aliens might have to be detained," Id., at 51143, the INS justifies the new restriction solely as a reasonable measure for the "safeguarding of employment of U.S. citizens . . ." *Ibid.*

3. The new regulation removes the power of administrative Immigration Judges to set the conditions of bond of persons in deportation and exclusion proceedings over which the Immigration Judges preside. 8 C.F.R. Section 242.2. While the Immigration Judges are entirely independent of the INS, Federal Register, Vol. 48, No. 39, pages 8039-40 (February 25, 1983), 8. C.F.R. Section 3 (1983), coming under the jurisdiction of the Executive

Office for Immigration Review, *Ibid.*, the regulation challenged herein, which significantly reduces the power of the Immigration Judges, was only proposed and made final under order of the INS Commissioner.

4. Under the new regulation a person released from detention by defendants may obtain "work authorization" only upon a showing of "compelling reasons." 8 C.F.R. Section 103.6(a)(iii). The regulation does not provide for a due process hearing of any type, does not describe what type of form shall be used to make an application, and provides *no* time limits within which a request for work authorization must be responded to. *Ibid.* No appeal lies from the denial of an application for work authorization. *Ibid.*

5. As is more fully set forth below, plaintiffs allege that the challenged regulation is without statutory authority, is not reasonably related to the agency's statutory power to release persons on bond in a manner designed to ensure their presence at future proceedings, was promulgated unlawfully in that the INS Commissioner is without power to remove matters over which the independent Immigration Judges have jurisdiction, violates the due process clause of the Fifth Amendment in that no hearing is provided for before work authorization can be denied, and violates the Fifth Amendment's equal protection guarantee in that only indigent persons will be severly injured by the challenged regulation.

II

Jurisdiction and Declaratory Judgment

6. Jurisdiction for this action is had pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1361 (mandamus jurisdiction): 8 U.S.C. § 1324 (federal district court jurisdiction for disputes arising under the Immigration Act).

7. Declaratory judgment is sought pursuant to 28 U.S.C. § 2202.

III

Parties

8. The National Center for Immigrants [sic] Rights, Inc., is a non-profit, tax-exempt corporation dedicated to the protection and promotion of the rights of immigrants and refugees residing in the United States. Located in Los Angeles, California, NCIR, Inc., represents indigent immigrants and refugees in proceedings before INS throughout the United States. NCIR, Inc., is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

9. The American Friends Service Committee is a non-profit, tax-exempt corporation dedicated, *inter alia*, to the protection and promotion of the rights of immigrants and refugees residing in the United States. With offices throughout the United States, the AFSC represents indigent immigrants and refugees in proceedings before INS. AFSC is a membership organization. It has approximately 350 clients and members (including about 80 presently in INS detention) who will be irreparably injured unless implementation of the challenged regulation is enjoined.

10. El Rescate ("The Rescue") is a non-profit organization based in Los Angeles, California, which provides legal assistance to low-income immigrants and refugees. El Rescate is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

11. Plaintiff the UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 645, is a duly composed union in the United States with many immigrant and refugee members currently employed in this country and under contracts protected by the National Labor Relations Act and the National Labor Relations Board. Au-

thoritative decisions issued by the National Labor Relations Board and various federal Courts of Appeal have held that undocumented immigrants and refugees are entitled to work in the United States and are eligible for the statutory protections of the National Labor Relations Act. The plaintiff union's members will be directly and unlawfully impacted by implementation of the INS regulations challenged herein. Duly authorized union members will be prohibited from working, including undocumented immigrant members who have recently won decisions from the National Labor Relations Board providing that they are entitled to work in the United States.

12. CARECEN is a non-profit, tax-exempt corporation based in Washington, D.C., which provides free legal assistance to low-income immigrants and refugees. CARECEN is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

13. The WILLAMETTE VALLEY IMMIGRATION PROJECT is a non-profit, tax-exempt corporation based in Oregon, which provides free legal assistance to low-income immigrants and refugees. The Willamette Valley Immigration Project is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

14. The EL CONCILIO MANZO is a non-profit, tax-exempt corporation based in Tucson, Arizona, which provides free legal assistance to low-income immigrants and refugees. The El Concilio Manzo is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

15. CENTRO PRESENTE is a non-profit, tax-exempt corporation based in Cambridge, Massachusetts, which provides free legal assistance to low-income immigrants and refugees. The Centro Presente is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

16. The SOUTHERN CALIFORNIA ECUMENICAL COUNCIL is a non-profit, tax-exempt corporation based in Los Angeles, California, which, *inter alia*, provides free legal assistance to low-income immigrants and refugees through a project called EPIC. The Southern California Ecumenical Council has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

17. The TUCSON ECUMENICAL COUNCIL is a non-profit, tax-exempt corporation based in Tucson, Arizona, which, *inter alia*, provides free legal assistance to low-income immigrants and refugees through a project called EPIC. The Southern California Ecumenical Council [sic] has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

18. The CENTRO PARA INMIGRANTES DE HOUSTON is a non-profit, tax-exempt corporation based in Houston, Texas, which provides free legal assistance to low-income immigrants and refugees. The Centro is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

19. The INTERNATIONAL INSTITUTE OF BOSTON is a non-profit, tax-exempt corporation based in Boston, Massachusetts, which provides free legal assistance to low-income immigrants and refugees. The Institute is a membership organization. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

20. The CENTER FOR IMMIGRANTS RIGHTS is a non-profit organization based in New York City, which provides free legal assistance to low-income immigrants and refugees. The Center is a membership organization. It has many clients and members who will be irreparably

injured unless implementation of the challenged regulation is enjoined.

21. The IMPERIAL VALLEY IMMIGRATION PROJECT is a non-profit organization based in El Centro, California, which provides free legal assistance to low-income immigrants and refugees in INS detention at the INS detention faciiity in El Centro, Califonia. It has many clients and members who will be irreparably injured unless implementation of the challenged regulation is enjoined.

22. *Named Individual Plaintiffs*:

(a) Plaintiff Mirza Odilia Hernandez Diaz (A24 287 610) was arrested by INS agents on or about December 10, 1983, in California. Her bond was set at $4,000 by the INS District Director in San Diego, California. She was detained in El Centro, California. On December 13, 1983, an attorney, David Stockman, filed a Notice of Appearance form (G-28) with INS in El Centro, California. On the same day a bond redetermination hearing was held before Immigration Judge Minjares upon plaintiff's application to have her bond lowered and for removal of the "no work" condition attached to her bond by the INS. Plaintiff Hernandez Diaz was not provided a due process hearing. Her hearing was not recorded in any manner, no sworn testimony was allowed, the INS's evidence was submitted solely through the hearsay statements of an INS attorney without the opportunity for cross-examination, and she was allowed no discovery of either positive or derrogatory [sic] evidence in the possession of INS. The Immigration Judge lowered her bond to $2,000 but refused to remove the "no work" condition on her bond. She has appealed this decision to the Board of Immigration Appeals, but does not expect a response for at least one to two months. Bea Hernandez Bonding Company has agreed to post her bond as a friend has liened property to the bonding company. This plaintiff will be released from detention on December 16, 1983, but is prohibited

from working. Plaintiff Diaz cannot afford to survive if she is prohibited from working under threat of arrest; she also cannot continue to retain legal counsel to represent her in INS proceedings to determine the legality of her presence in the United States. Unless the "no work" condition attached to her release bond is immediately removed, she might have no alternative but to abandon her statutory right to a due process deportation hearing.

(b) Plaintiff Maximiliano Martinez Orellana (A26 761 853) was arrested by INS agents on or about December 10, 1983, in California. His bond was set by INS at $5,000 and he has been detained at an INS facility in El Centro, California. INS has imposed a "no work" condition on his bond. On December 15, 1983, a bail redetermination hearing was held before an Immigration Judge. An application was made to reduce the amount of the bond and to remove the "no work" condition on his release bond. His bond was reduced to $2,500, but the Immigration Judge refused to remove the "no work" condition on his release bond. Plaintiff Martinez Orellana was not provided a due process hearing. His hearing was not recorded in any manner, no sworn testimony was allowed, the INS's evidence was submitted solely through the hearsay statements of an INS attorney without the opportunity for cross-examination, and he was allowed no discovery of either positive or derrogatory [sic] evidence in the possession of INS. Any appeal to the Board of Immigration Appeals would be futile because no record of his hearing was made. He is precluded from obtaining his release on bond because of the attachment of the "no work" condition attached to his bond release.

(c) Plaintiff Rosa Maria Tobar Rivas (A26 945 951) was arrested in the Harlingen INS district on or about October 27, 1983. Bond was immediately set in her case at $4,000. Attorneys for Proyecto Libertad entered a formal appearance in the case on November 14, 1983. A bond redetermination hearing before an Immigration Judge was requested on November 16, 1983. No hearing

was ever scheduled. The bond was posted on December 8, 1983. A "no work" condition of bond was attached at the time of the plaintiffs [sic] release from detention. On December 12, 1983, this plaintiff's attorneys applied to the INS District Director in Harlingen, Texas, to grant work authorization and remove the "no work" condition from the plaintiff's release bond. On the same day a renewed application was made to an Immigration Judge seeking removal of the "no work" condition of the bond. To date neither application has been responded to. Plaintiff Maria Tobar Rivas remains free on bond but is prohibited from engaging in employment.

(d) Plaintiff Guillermo Vanegas (A27 034 358) was arrested on or about December 14, 1983 by INS agents in New York. His bond was set by INS on the same day at $3,000. A bond redetermination hearing was held on December 15, 1983. His bond was lowered to $2,000, but the automatic "no work" condition placed by INS was not removed by the Immigration Judge. Plaintiff Vanegas has lived in the United States for approximately seven years, and has been at the same job with Manrook-Lassou in County of Kings for about six years. He now faces imminent loss of his job and cannot survive or afford to retain legal counsel to represent him in INS proceedings unless the "no work" condition attached to his bond is removed. While detained (or if released without the right to work) he is unable to afford to retain counsel to assist him in an appeal to the Board of Immigration Appeals. Despite his possible ability to legalize his status pursuant to 8 U.S.C. Section 1254, he will likely be forced to abandon his legal rights unless an order issues from this Court enjoining enforcement of the automatic "no work" condition placed on his bond.

(e) Plaintiff Antonio Mendoza Romero (A26 206 783) was arrested by INS agents on or about November 28, 1983, in Baltimore, Maryland. Without ever having a bail hearing before an Immigration Judge, he was bonded out of detention on or about December 12, 1983.

His bond papers prohibit him from working while awaiting INS proceedings to determine his status in the United States. Because of the "no work" condition attached to his bond, this plaintiff cannot afford to retain counsel in Baltimore and is represented by *pro bono* counsel (Patrice Perillie) in Washington, D.C. As plaintiff Romero lives in Washington, D.C., and because that is where his pro bono counsel is located, his attorney filed a motion with INS in Baltimore to change venue in the case to Washington, D.C. Plaintiff Romero cannot apply for an Immigration Judge hearing on his "no work" condition of bond in Baltimore because the "no work" provision prevents him from engaging in employment and being able to retain counsel. On the other hand, he cannot obtain a hearing in Washington, D.C., until his INS file has been transferred there from Baltimore, a matter which will take a number of weeks. In the meantime plaintiff Romero is prohibited from working, has no other sources [sic] of income, and cannot survive in the United States under such circumstances.

(f) Santos Adalberto Lopez-Duran (A26 408 989), was arrested by INS agents in Houston, Texas, on or about August 16, 1983. Release bond was set at $3,500. Shortly after his arrest, plaintiff Lopez-Duran was transferred to the INS detention facility at Los Fresnos, Texas. He is represented by Proyecto Libertad, a Texas non-profit corporation providing free and low-income legal representation to indigent persons in INS proceedings. A bond hearing was requested by his attorney, Lisa Brodyaga, on December 9, 1983. To date no bond hearing has been scheduled before an Immigration Judge. Plaintiff Lopez-Duran cannot obtain his release from detention while the "no-work" bond condition is applied in his case.

(g) Julio Fernando Lorine-Garcia (A26 408 989), is presently detained by INS at Los Fresnos, Texas. He is represented by Proyecto Libertad, a Texas non-profit corporation providing free and low-income legal representation to indigent persons in INS proceedings. A bail re-

duction hearing was requested by his attorney, Lisa Brodyaga, on December 9, 1983. To date no bail hearing has been scheduled before an Immigration Judge. Plaintiff Lorine-Garcia cannot obtain his release from detention while the no-work bond condition is applied in his case.

(h) Plaintiffs Refael Antonio Perez (A26 967 632), Raul Armando Marroquin (A26 967 801), and Ricardo Delgado Oseguena (A24 267 349) are indigent immigrants and refugees held in detention by INS. They are clients and members of El Rescatē, a California nonprofit organization providing free legal assistance to indigent immigrants and refugees. The "no work" condition attached to their INS bonds has precluded their release on bond pending the completion of INS proceedings to determine the legality of their status in the United States. But for the "no work" condition attached to their bonds, El Rescate could obtain their release from detention with the assistance of religious and lay supporters of the organization who generally provide sponsorship and/or collateral to obtain the services of bondsmen.

(i) Plaintiff Miguel Angel Gomez-Vasquez (A27 176 926) was arrested by border patrol agents on or about October 27, 1983, near Laredo, Texas. On the same day as his arrest, bond was set in the amount of $7,500. He was later transferred to an INS detention facility in El Paso, Texas. On or about November 3, 1983, a notice of appearance form (G-28) was filed on his behalf by attorney Patrick Hughes, of Proyecto Libertad. A telephonic bond redetermination hearing was held with an Immigration Judge at El Paso after his transfer there and bond was reduced to $2,500. Bond was posted on December 8, 1983. At the time of his release from detention, after the telephonic hearing with an Immigration Judge, INS attached a "no work" condition on his release bond. On December 13, 1983, his attorney requested that the "no work" condition be removed from his bond, or that the bond proceeding be reopened before the

Immigration Judge. The INS in El Paso, Texas, advised this plaintiff's counsel that it would "consider" the request. To date no response to the request has been received. Plaintiff Gomez-Vasquez is now released from custody but precluded from working in the United States pending the outcome of INS proceedings to determine the legality of his presence in the United States.

(j) Plaintiffs Fidel Angel Henriquez Duran (A26 946 307) and Daniel Antonio Garcia Reyes (A26 946 308) were arrested in the Harlingen INS district on or about November 20, 1983. INS bonds were set at $4,000. They were represented by both CARECEN (an organizational plaintiff herein) and Proyecto Libertad. Bonding arrangements were made and efforts were made to post bond on December 8, 1983. At that time, INS informed the bonding company, National Bonding Co., that "no-work" conditions would be placed on the bonds. Thereafter the National Bonding Company withdrew the bonds. A hearing was requested with an Immigration Judge on December 9, 1983, to remove the "no-work" condition from the bonds. To date, no hearings have been scheduled. These plaintiffs remain in detention on this date.

(k) Plaintiff Ana Berta Martinez (A27 180 007) was arrested near Laredo, Texas, on or about October 25, 1983. Her INS bond was set at $7,500. Shortly thereafter, she was transferred to the INS detention facility at Los Fresnos, Texas. She is represented by Proyecto Libertad. Her attorneys requested a bond redetermination hearing with an Immigration Judge on November 1, 1983. A hearing was almost held on December 6, 1983, but was cancelled because of the crowded docket. A renewed request was filed with the Immigration Judge on December 9, 1983. To date, no new hearing has been scheduled. Due to the INS delay in scheduling a bond redetermination hearing before an Immigration Judge for this plaintiff, she now cannot be released from detention without a "no work" condition attached to her bond.

(l) Plaintiff Dionisio Navarette Merlos (A26 946 247) was arrested by the Border Patrol in the Harlingen INS district on or about November 16, 1983. INS bond was set at $4,000. He is represented by Proyecto Libertad. His attorneys requested a bond redetermination hearing with an Immigration Judge on November 25, 1983. On November 30, 1983, his bond was administratively reduced by the INS District Director to $3,500 pursuant to 8 C.F.R. Section 242.2(a). On December 9, and again on December 12, 1983, his attorney inquired of an INS Deportation Officer at the Los Fresnos detention facility and the Chief Legal Officer for the Harlingen District whether a "no-work" condition would be placed on his bond when it was posted. The Officers stated that it was the position of the Harlingen District that such conditions were to be placed on all bonds posted on or after December 7, 1983, without regard to the date on which the bond was originally set by INS. Plaintiff Navarette Merlos now has the necessary prerequisites to post bond, but is prevented from doing so by the "no-work" condition which INS will place on his bond when it is posted.

All of the individually named plaintiffs are without the financial means to support themselves without the ability to be employed. These plaintiffs, while prohibited from working, are also without the financial means to retain counsel to assist them in Immigration Judge hearings or appeals to the Board of Immigration Appeals concerning the prohibition preventing them from working while involved in INS proceedings. Under the guidelines established in defendants' challenged regulation, the plaintiffs cannot establish a "compelling reason" to be employed (other than the need to eat, etc.) while INS processes their pending applications for benefits which might entitle them to lawfully remain in the United States. They cannot even afford to retain counsel to assist them in such applications. They are also aware that such applications

take from about one month to two years to process by INS. Like all other immigrants and refugees with applications for benefits pending before the Immigration Service, these plaintiffs need to be employed so that they can obtain the bare necessities of life (food, clothing, shelter, medical services, etc.) while INS adjudicates their applications for benefits, a matter which might take more than one year. Many of these plaintiffs also have children to support.

23. JANE DOE I is an immigrant who is currently in the process of preparing various applications for immigration statutory benefits and who intended to surrender to the INS and apply for such benefits in the coming weeks. Until December 7, 1983, this plaintiff could have surrendered to the INS to apply for benefits knowing that she would likely be released from detention under bond within a matter of hours or days. This plaintiff will not surrender to INS to seek statutory benefits on or after December 7, 1983, because she has become aware of the challenged regulation and is afraid that she will never win release from detention if she surrenders to INS once the challenged regulation is implemented.

24. Defendant the IMMIGRATION AND NATURALIZATION SERVICE is an agency of the Department of Justice and is responsible for implementing the Immigration and Nationality Act, 8 U.S.C. Sections 1101, *et seq.*

25. Defendant Alan Nelson is the duly appointed Commissioner of the INS and was the person responsible for the promulgation of the challenged regulation.

26. Defendant WILLIAM FRENCH SMITH is the Attorney General of the United States and is statutorily responsible for implementation of the Immigration and Nationality Act. 8 U.S.C. Section 1103.

IV

CLASS ACTION

27. Pursuant to Rule 23(a) and (b)(2), plaintiffs seek to have this case certified as a class action on behalf of all persons whose release from INS detention on or after December 7, 1983, will be conditioned by the no employment restriction found in the challenged regulations, 8 C.F.R. Sections 103.6 and 109.1.

28. Defendants' challenged regulation is or will be applied in a uniform manner to all persons in INS detention on or after December 7, 1983, and the issues of law and fact raised by plaintiffs and their proposed class members are identical. The number of class members is in the thousands and is too large to feasibly join in this action.

V

FIRST CAUSE OF ACTION

27. Plaintiffs incorporate herein by reference all proceeding [sic] paragraphs.

28. The INS has the statutory authority to arrest and detain persons reasonably believed to be aliens unlawfully present in the country. 8 U.S.C. Section 1252(a). The Attorney General has the statutory discretion and due process obligation to release persons "under bond . . . containing such conditions as the Attorney General may prescribe . . ." *Ibid.*; 8 C.F.R. Section 242.2.

29. 8 C.F.R. Sections 103.6 and 109.1 (1983) are without statutory authority in that the broad prohibition against employment contained in these regulations is not reasonably related to ensuring the respondent's presence at future administrative hearings. Nor is the employment restriction reasonably related to any other legitimate governmental interest justifying the imposition of the restriction. The challenged regulations are arbitrary, capricious and an abuse of discretion.

VI

SECOND CAUSE OF ACTION

30. Plaintiffs incorporate herein by reference all proceeding [sic] paragraphs.

31. The INS Commissioner is without statutory authority to promulgate a final regulation which removes jurisdiction from the independent Immigration Judges on bond matters and places authority for such matters in the hands of INS employees of the Commissioner. Since February 1983 the Special Inquiry Officers have no longer been under the jurisdiction of the INS Commissioner, and now are directed in "the execution of their duties" by the "newly created" Executive Office of Immigration Review. Federal Register, Vol. 48, No. 39 (February 25, 1983) pages 8039 (amending 8 C.F.R. Section 3) and 8057 (amending 28 C.F.R. Section 0.19). 8 C.F.R. Section 3 (1983) and 28 C.F.R. Section 0.105 (1983) clearly withdrew the INS Commissioner's authority over Special Inquiry Officers. The Attorney General has only delegated to the INS Commissioner certain administrative functions, "except the authority delegated to the Executive Office for Immigration Review . . . [and] Special Inquiry Officers." 8 C.F.R. Section 100.2 (amended 1983) (Federal Register, Vol. 48, No. 39, page 8040. [sic] The INS Commissioner's final regulation is unlawful and void.

VII

THIRD CAUSE OF ACTION

32. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

33. The employment prohibition contained in 8 C.F.R. Sections 103.6 and 109.1 violate [sic] the due process clause of the Fifth Amendment in that they [sic] seek to completely and totally restrict the exercise of an important liberty without the opportunity for notice and hearing and a due process proceeding of record.

VIII

FOURTH CAUSE OF ACTION

34. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

35. The employment prohibition contained in 8 C.F.R. Sections 103.6 and 109.1 violate [sic] the equal protection guarantee of the Fifth Amendment in that the loss of the right to be employed imposed by the regulations remains in effect for as long as the INS takes to process the immigrant or refugee's pending application(s) and, without regard to any difference in their circumstance concerning their likelihood of appearing in future administrative proceedings, adversely affects indigent people while not affecting similarly situated persons with financial resources.

IX

FIFTH CAUSE OF ACTION

36. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

37. Defendants' challenged regulation is inconsistent with and is superceded by federal laws which allow all immigrants and refugees (other than those present in the country with non-immigrant visas) to be employed and to be eligible for the benefits of protective labor legislation. 29 U.S.C. Sections 141, *et seq.* (National Labor Relations Act); 29 U.S.C. 201-219 (Fair Labor Standards Act); 29 U.S.C. Section 651, *et seq.* (Occupational Safety and Health Act).

X

SIXTH CAUSE OF ACTION

38. Plaintiffs incorporate by reference all proceeding [sic] paragraphs.

39. Defendants have unlawfully failed to establish uniform standards and procedures to implement "work authorization" policies under existing policies and regula-

tions (including 8 C.F.R. Sections 109.1(b)(2), 208.4), and have arbitrarily and capriciously denied work authorization, or failed to respond to requests for work authorization, without compliance with substantive or procedural Fifth Amendment due process and in a manner contrary to law.

XI

IRREPARABLE INJURY

40. Plaintiffs and the members and clients of the plaintiff organizations will suffer irreparable injury unless an injunction is issued prohibiting enforcement of the unlawful INS regulations challenged herein. This injury will include, *inter alia*, the inability of persons to bond out of detention pending lengthy administrative proceedings without regard to their likelihood to appear at future hearings, the forced abandonment of applications and petitions for important statutory benefits for lawful status due to indefinite detentions and the release of persons without affording them the opportunity to obtain the basic necessities of life, and the separation of families through unnecessary detentions.

XII

PRAYER FOR RELIEF

Wherefore, plaintiffs pray that this Court:

1. Assert jurisdiction over this complaint;

2. Issue a temporary restraining order prohibiting implementation of 8 C.F.R. Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8);

3. Issue a preliminary injunction prohibiting implementation of 8 C.F.R. Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8);

4. Issue a permanent injunction prohibiting implementation of 8 C.F.R. Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8);

5. Issue a declaratory judgment providing that 8 C.F.R Sections 103.6(a)(2)(ii)-(iii) and 109.1(b)(8) are without statutory authority, bear no reasonable relationship to respondents' future appearances at deportation proceedings, bear no relationship to any other legitimate government interest, violate the due process clause and the equal protection guarantee of the Fifth Amendment, and were promulgated in an unlawful manner in that the INS Commissioner has no jurisdiction over the Special Inquiry Officers;

6. Grant plaintiffs reasonable costs and attorneys fees;

7. Grant such further relief as the Court may deem just and proper.

DATED: December 5, 1983

By: /s/ Peter A. Schey
PETER A. SCHEY
Counsel of Record
for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-7927-Kn

NATIONAL CENTER FOR IMMIGRANTS [sic] RIGHTS, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

ANSWER TO FIRST AMENDED COMPLAINT

[Filed Sep. 4, 1984]

Defendants answer the First Amended Complaint as follows:

1. Paragraphs 1 through 5 contain plaintiffs' characterization of their lawsuit with reference to various statutory and regulations [sic] provisions. Said paragraphs do not contain any averments of fact to which a response is required. However, insofar as a response may be deemed required, defendants state that the statutory and regulatory provisions speak for themselves and deny any factual allegations contained in paragraphs 1 through 5.

2. Inasmuch as paragraphs 6 and 7 attempt to set forth jurisdiction of this Court, said paragraphs contain legal conclusions to which no answer is required. However, defendants affirmatively assert that for reasons stated in their Motion to Dismiss to this Court, there is no jurisdiction over this matter.

3. Paragraphs 8 through 21 contain various factual details concerning the non-profit corporate and union

plaintiffs to which, except for the geographical averments which the defendants admit and the averment denied below, the defendants lack sufficient knowledge or information at this time to form a belief as to the truth thereof. To the extent that any of the aforementioned plaintiffs claim that they or their clients/members will be irreparably injured by the regulation in dispute, the defendants deny said averment.

4. In answering paragraph 22, defendants are informed, believe and therefore affirmatively make the allegations contained in Exhibit "A" hereto. Except as so admitted in Exhibit A, the defendants deny each and every averment contained in paragraph 22.

5. Defendants are without any information or knowledge to form a belief as to the truth of the averments of paragraph 23 and thus deny them.

6. Defendants admit the allegations in paragraphs 24 through 26.

7. Paragraphs 27 and 28 contain characterizations of this lawsuit and not averments of fact to which a response is required. But, insofar as a response may be deemed required, defendants deny.

8. In answering paragraph 27 of the First Cause of Action [1] defendants incorporate herein all preceding paragraphs.

9. Paragraph 28 of the First Cause of Action contains only conclusions of law to which no response is required but to the extent a response is deemed required, defendants admit them.

10. Paragraphs 29, 33, 35, 37, and 39 contain conclusions of law to which no response is required; but to the extent a response is deemed required, defendants deny.

11. In answering paragraph 31: (a) defendants state that the first sentence only contains a conclusion of law to which no response is required, but to the extent a response is deemed required, defendants deny; (b) defendants admit the second and third sentences; and (c) defendants deny the fourth sentence.

[1] The Amended Complaint has duplicative numbered paragraphs 27 and 28.

12. In answering paragraphs 30, 32, 34, 36 and 38 defendants incorporate herein all preceding paragraphs.

13. Defendants deny the allegations in paragraph 40.

14. The remaining paragraphs of the Complaint delineate plaintiffs' prayer for relief to which no response is required.

AFFIRMATIVE DEFENSES

1. The Amended Complaint fails to state any claim upon which relief can be granted.

2. This Court lacks subject matter jurisdiction.

3. This action is not ripe.

4. The plaintiffs have failed to exhaust their administrative remedies.

5. The plaintiffs lack standing.

DATED: This 4th day of September, 1984.

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
INGRID K. HRYCENKO
Special Assistant U.S. Attorney

/s/ George H. Wu
GEORGE H. WU
Assistant U.S. Attorney

Attorneys for Defendants

[Exhibit Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-7927-KN (JRx)

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL.,
PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Jul. 1, 1985]

This matter came on for hearing on Defendants' motion for summary judgment and the court, having considered the briefs filed by the parties, and all of the evidence and pleadings on file in this matter, enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

To the extent that any of the Conclusions of Law stated herein are deemed to be Findings of Fact, they are incorporated herein by reference.

1. In 1983, the Immigration and Naturalization Service ("INS") promulgated Regulations[1] (the "Regulations") which place a condition barring employment (a "no-work condition") in an appearance and delivery bond in connection with deportation proceedings.

[1] 8 C.F.R. §§ 103.6(a)(2)(ii), (iii) (1983); 109.1(b)(8) (1983). Federal Register, Vol. 48, No. 42, pages 51142-51144 (November 7, 1983).

2. The previous INS regulations provided that in his discretion the District Director, with the prior approval of the INS Regional Commissioner, could include a condition barring unauthorized employment in an appearance and delivery bond in connection with deportation proceedings.[2] In the Regulations now being challenged, the INS does away with individualized determinations.

3. Suspected deportable aliens released from INS custody on a bond including the no-work condition and later found engaged in employment could be rearrested and thereafter detained pending the final outcome of their deportation proceedings.

4. On December 16, 1983, after hearing evidence and testimony, the Court granted a preliminary injunction enjoining the enforcement of the Regulations. The Court of Appeals upheld the preliminary injunction on September 28, 1984. *National Center for Immigrants' Rights, Inc. v. Immigration and Naturalization Service*, 743 F. 2d 1365 (9th Cir. 1984).

5. The INS then brought a motion for summary judgment, pursuant to Fed. R. Civ. P. 56(b), on grounds that there existed no genuine issue of material fact and that summary adjudication was appropriate. The Court finds that no genuine issue of material fact exists as to plaintiffs [sic] First Cause of Action and that summary adjudication as to that cause is appropriate.

CONCLUSIONS OF LAW

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusion [sic] of Law, they are incorporated herein by reference.

1. Summary judgment may be granted to the nonmoving party. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309

[2] *Matter of Vea*, Interim Decision #2890 at 5 (BIA 1981); *Matter of Leon-Perez*, 15 I & N Dec. 239 (BIA 1975); 8 C.F.R. § 103.6(a)(2)(ii).

(9th Cir. 1982); Wright and Miller, *Federal Practice and Procedure*, § 2720 (1983).

2. The Court properly has jurisdiction over Plaintiffs' claims under the immigration statutes, 8 U.S.C. § 1329, 28 U.S.C. § 1331, and the Constitution.

3. The challenged regulations state in relevant part:

> § 103.6 Surety Bonds.
>
> (a) . . . .
>
> (2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in the bond is not on Form I-351, a rider containing the condition shall be executed.
>
> (ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.
>
> (iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:
>
> (A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;
>
> (B) Prior immigration violations by the alien;
>
> (C) Whether there is a reasonable basis for considering discretionary relief; and
>
> (D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

> § 109.1 Classes of aliens eligible.
>
> . . . .
>
> (b) . . . .
>
> (8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.
>
> . . . .

8 C.F.R. §§ 103.6, 109.1 (1983).

4. The Court grants summary judgment on the First Cause of Action and finds as a matter of law that the Regulations at issue were promulgated without statutory authority and therefore are invalid. Since the Court grants summary judgment as to Plaintiffs' First Cause of Action, consideration of the remaining five causes of action is unnecessary.

5. The Attorney General cannot impose release conditions based on the Immigration and Nationality Act ("INA"), § 242(a), 8 U.S.C. § 1252(a), which further perceived [sic] a broad purpose of the INA, but which are unrelated to securing the suspected illegal alien's presence at future deportation proceedings.

6. INA § 242(a), 8 U.S.C. § 1252(a) provides in part:

> Pending a determination of deportability in the case of any alien . . ., such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond

or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody and detained until final determination of his deportability.

7. Although § 1252(a) appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien on bond, this discretion must be interpreted in light of a previous version of § 1252(a), as contained in § 242 of the INA, and its legislative history, as well as administrative and judicial decision [sic] concerning the scope of the Attorney General's discretion.

8. The previous version of § 1252(a) read in part:

> . . . such alien may, in the discretion of the Attorney General, (1) be continued in custody; or (2) released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody . . .

Pub. L. 831, 81st Cong., 1st Sess. § 23, reprinted in 1950 U.S. Code Serv. 1006.

The accompanying legislative history of the earlier version of § 1252(a) stated:

> These provisions, of course, enumerate only one of the conditions which is mandatory in the bond or as a parole condition. *This bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit to include. Thus, a man released on bond might have as a condition of*

> *the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information.* Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or less amount or other conditions shall be furnished. This bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien . . .

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added).

9. When Congress enacted § 1252(a) in its present form, the legislative history indicates that "this provision, in general, follows the procedure established by § 23 of the Subversive Activities Control Act of 1950." H.R. Rep. No. 1365, 82 [sic] Cong., 2d Sess., 57, reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1711.

10. The aforementioned legislative history indicates that the Attorney General's discretion to condition release on bond pending the outcome of a deportation proceeding is properly limited to conditions which are related to securing an alien's appearance at future proceedings.

11. (A) The INS' reliance on *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L. Ed. 547 (1952), in asserting that the Attorney General may condition release on the basis of protecting the American labor market is misplaced. *Carlson* involved a challenge to the Attorney General's power to hold five active Communists without bail pending the determination of their deportability. The Supreme Court examined the applicable deportation standards and found that in carrying out the policies and standards as to what aliens are subject to deportation, "the Attorney General is not left with un-

trammeled discretion as to bail. . . . He must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." 342 U.S. 524, 543.

(B) The *Carlson* Court examined the specific legislative scheme of Title I, Section 2 of the Internal Security Act of 1950 and found that the statute granted the Attorney General discretion broad enough to justify his detention of the Communists. *Id.*, at 541. The statute provides in pertinent part:

> The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Internal Security Act, Title I, § 2(15) (1950). Based on its examination of the legislative scheme, the *Carlson* Court found that this provision was,

> designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American People. To this end provision was made for the detention and deportation of certain noncitizens, including members of the Communist Party.

342 U.S. at 544. The Court found that the Communist threat to the national security was controlling: ". . . we

also take into consideration the factors of probable availability for trial, which we do not think is of great significance in cases involving security from Communist activities of alien Communists . . ." *Id.*, at 541, n. 35.

(C) In *Carlson* the Court concluded that "[a]s the purpose of the Internal Security Act to deport all Alien Communists as a menace to the security of the United States is established by the Internal Security Act itself, Title I, Section 2, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all these parties without bail as menace to the public interest." 342 U.S. at 541.

(D) The broad scope of discretionary power granted to the Attorney General by Section 2 of the Internal Security Act is distinguishable from his power to impose bond conditions under the INA. As the Court of Appeals noted in *National Center for Immigrants*" [sic] *Rights, Inc.*:

> In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "the INA evinces 'at best evidence of peripheral concern with the employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803 (1984), [sic] (quoting *De Canas v. Bica*, 424 U.S. 351, 361 (1976)).

National Center for Immigrants' Rights, Inc., supra, 743 F.2d at 1370.

12. Supreme Court cases concerning the employment of deportable aliens cast doubt on the INS' assertion that the legislative scheme of the INA justifies the Attorney General's exercise of discretion to impose no-work conditions on release. The *De Canas* Court stated:

> The central concern of the INA is with the terms and conditions of admissions to the country and subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without

more, cannot be said to draw in the employment of illegal aliens as "plainly within . . . (that) central aim of federal regulation."

424 U.S. 351, 359; *see also Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2809.

13. INA § 242(a), 8 U.S.C. § 1252(a), does not authorize the Attorney General to impose a blanket prohibition against employment of all suspected deportable aliens pending the outcome of their due process expulsion proceedings.

14. (A) *Carlson* does not lend credence to INS' position that the Attorney General possesses such broad authority. In *Carlson* there was evidence as to each individual, "indicating . . . that he was at the time of arrest a member of the Communist Party of the United States and had . . . participated . . . in the Party's indoctrination of others to the prejudice of the public interest." 342 U.S. at 530.

15. In conformity with judicial precedent, under the prior regulation the INS required specific, individualized information to justify an employment prohibition condition in each case. *Matter of Vea*, Interim Decision #2890 at 5 (BIA 1981 [sic]; *Matter of Leon-Perez*, 15 I & N Dec. 239 (BIA 1975); [sic] In *Matter of Chew*, 15 I & N Dec. 2910 (BIA 1982), the Board of Immigration Appeals upheld an employment restriction as a condition of bond based on a find [sic] that it was "appropriate in this case." *Id.*, at 265.

DATED: July 1, 1985

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 90-1090

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL.

ORDER ALLOWING CERTIORARI

[Filed April 1, 1991]

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 2 presented by the petition.

April 1, 1991

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No. 90-1090

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

A provision of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(1), authorizes the release of aliens, pending determination of deportability, on bonds containing "such conditions as the Attorney General may prescribe." The question presented is whether that provision prohibits promulgation of a rule generally requiring that release bonds contain a condition forbidding unauthorized employment pending determination of deportability.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are the Immigration and Naturalization Service; Gene McNary, Commissioner of the Immigration and Naturalization Service; and Richard Thornburgh, Attorney General of the United States. Respondents, plaintiffs below, are National Center for Immigrants' Rights, Inc.; American Friends Service Committee; El Rescate ("The Rescue"); Central American Refugee Center; El Concilio Manzo; Williamette Valley Immigration Project; Southern California Ecumenical Council; Centro Presente, Inc.; Tucson Ecumenical Council; Hermandad Nacional Mexicana; Coalition for Visas and Rights for the Undocumented; Centro Para Immigrantes de Houston; International Institute of Boston; Center for Immigrants Rights; Imperial Valley Immigration Project; United Automobile, Aerospace and Agricultural Implement Workers of America Local 645; and the following individuals: Santos Adalberto Lopez-Duran, Julio Fernando Lorine-Garcia, Raphael Antonio Perez, Raul Armando Marroquin, Ricardo Delgado Osegueda (or Oseguena), Mirza Odilia Hernandez Diaz, Maximiliano Martinez Oriana (or Orellana), Rosa Maria Tovar Rivas (or Tobar Rivas), Dennis Gillermo Venegas, Antonio Mendoza Romero, Migel (or Miguel) Angel Gomez Vasquez (or Gomez-Vasquez), Fidel Angel Henriquez Duran, Daniel Antonio Garcia Reyes, Ana Berta Martinez, Dionisio Navarette Marlos (or Merlos), and Jane Doe I (an alien who claims to be deterred from filing for benefits with INS because of fear that the regulations at issue would result in her indefinite detention).

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-60a, is reported at 913 F.2d 1350. An earlier opinion in the same appeal, regarding an issue of appellate jurisdiction, Pet. App. 61a-65a, is reported at 892 F.2d 814. The opinion of the district court, Pet. App. 66a-70a, is unreported.

Several opinions were issued by the courts below prior to this Court's 1987 order, which granted our previous petition for certiorari, vacated the judgment below, and remanded the case to the court of appeals. See 481 U.S. 1009. The court of appeals decision vacated by this Court, Pet. App. 71a-80a, is reported at 791 F.2d 1351. The district court order from

which that appeal was taken, Pet. App. 81a-95a, is reported at 644 F. Supp. 5. An earlier opinion of the court of appeals affirming the issuance of a preliminary injunction, Pet. App. 96a-108a, is reported at 743 F.2d 1365. The district court's opinion granting the preliminary injunction, Pet. App. 109a-118a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1990. On November 23, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 5, 1991 (a Saturday). The petition for certiorari was filed on January 7, 1991, and was granted on April 1, 1991, limited to Question 2 presented by the petition.[1] J.A. 59. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 103(a), 212(a)(14), 241(a)(1), and 242(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1103(a), 1182(a)(14), 1251(a)(1), and 1252(a)(1), are reproduced at Pet. App. 119a-122a. 8 C.F.R. 103.6 and 8 C.F.R. 274a.12 are reproduced at Pet. App. 122a-136a. The notice promulgating the regulations at issue here, 48 Fed. Reg. 51,142-51,144 (1983), is reproduced at Pet. App. 137a-149a.

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[1] Question 1 presented a challenge to the jurisdiction of the district court in this case. In our reply brief at the petition stage, we withdrew that question in light of this Court's intervening decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991).

STATEMENT

Respondents—non-profit organizations, a local union, and individuals in deportation proceedings—filed an action in 1983 challenging a regulation of the Attorney General. The regulation provides that when an alien is released from custody pending deportation or exclusion proceedings, the bond obtained to secure the alien's release must in most cases include a condition forbidding unauthorized employment. Ten days after the regulation took effect, the district court issued a nationwide preliminary injunction barring its enforcement. The court of appeals affirmed, subject to a certification of a nationwide class. On remand, the district court certified a nationwide class and made the nationwide injunction permanent. The court of appeals affirmed the permanent injunction.

This Court granted the government's petition for a writ of certiorari, vacated the lower court's judgment, and remanded the case for further consideration in light of the Immigration Reform and Control Act of 1986 (IRCA). On remand, the district court reentered its nationwide injunction, and a divided panel of the court of appeals affirmed. This Court has again granted a writ of certiorari.

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, gives the Attorney General wide discretion to impose conditions on bonds securing aliens' release pending the outcome of deportation proceedings. Section 242(a)(1) of the Act (codified at 8 U.S.C. 1252(a)(1)) provides that aliens in deportation proceedings may be released on bond "with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe."

In 1983, the Immigration and Naturalization Service, to which the Attorney General has delegated his authority under 8 U.S.C. 1252(a)(1), see 8 C.F.R. 2.1, proposed a regulation requiring aliens to refrain from unauthorized employment as a condition of the bonds obtained to secure their release. The proposed regulation was to replace the prior procedure, which INS had found too cumbersome, under which district directors had to obtain prior approval from INS regional commissioners before imposing a condition against unauthorized employment in a release bond. 8 C.F.R. 103.6(a)(2)(ii) (1983). The proposed regulation included a condition prohibiting unauthorized employment in every "appearance and delivery bond in connection with a deportation proceeding or bond posted for release of an alien in exclusion proceedings, unless upon application by the alien the District Director determines that employment is appropriate" in light of certain specified factors. 48 Fed. Reg. 8820-8821 (1983). INS explained that the proposed regulation was "consistent with the general principle that employment of aliens in the United States is to be strictly controlled to safeguard the interest of U.S. citizens and permanent resident aliens." *Id.* at 8820.

In November 1983, INS published a revised, final regulation.[2] An accompanying explanation clarified

[2] The final regulation set forth factors to be considered in the exercise of the district directors' discretion whether to grant work authorization, including the safeguarding of employment opportunities for American citizens, prior violations of the immigration laws by the alien, whether an American citizen or lawful permanent resident is dependent on the alien for support, and whether there are other equities that should be considered. See 48 Fed. Reg. 51,144 (1983) (8 C.F.R. 103.6(a)(2)(iii) and 8 C.F.R. 109.1(b)(8)), Pet. App. 123a, 148a. The authority given to district directors under the regulation is in addition to district directors' preexisting authority, 8 C.F.R. 109.1(b)(1)-(7) (1983), to grant work authorization to aliens who are in certain specified statuses or who have applied for or been granted certain specified benefits.

During the pendency of this litigation, various regulations regarding alien work authorization—including 8 C.F.R. 109.1—have been amended and recodified at 8 C.F.R. 274a.12. Pet. App. 127a-136a. Subsections (a) and (b) of this new section list the immigration statuses that automatically convey work authorization. Subsection (c) sets forth provisions, such as the one at issue here, under which aliens may apply for work authorization. The specific provision regarding temporary work authorizations pending deportation proceedings (former 8 C.F.R. 109.1(b)(8) (1984)) now appears, with some elaboration as to the factors to be considered in granting such relief, as 8 C.F.R. 274a.12(c)(13). Pet. App. 135a-136a.

that the regulation would not diminish any employment authorization that an alien already had, since the regulation bars only "working without authorization"—*i.e.*, "unauthorized work [that] is a continuing violation of the immigration laws." 48 Fed. Reg. 51,142 (1983), Pet. App. 139a. The regulation therefore would *not* affect citizens and permanent resident aliens, who have authorization to work by virtue of their status. 48 Fed. Reg. 51,143 (1983), Pet. App. 142a-143a. Nor would the regulation affect asylum applicants who had filed nonfrivolous applications, since another regulation, 8 C.F.R. Pt. 208 (see also 8 C.F.R. 274a.12(c)(8)), governs employment authorization for such aliens. The primary effect of the regulation, INS explained, is to impose on aliens who enter the United States illegally, and who are *not* authorized to work, the burden of seeking employment authorization from the district director. 48 Fed. Reg. 51,143 (1983), Pet. App. 141a.

By placing the burden on these aliens, INS intends to remove an economic incentive for illegal entry, and also to remove an incentive to delay deportation proceedings when an alien is apprehended. Acknowledging that fewer bonds might be written and that more aliens might be detained under the new regulation, INS stated that those were acceptable costs in order to safeguard employment for U.S. citizens and permanent resident aliens. 48 Fed. Reg. 51,143 (1983), Pet. App. 141a.

2. On December 6, 1983, one day before the new regulation was to take effect, respondents filed this action challenging its validity on a variety of statutory and constitutional theories.[3] Ten days later, the district court issued a nationwide preliminary injunction prohibiting implementation of the regulation. Pet. App. 109a-118a. The basis for this ruling was that respondents had a "fair chance" of success on their arguments that 8 U.S.C. 1252(a)(1) does not authorize a condition unrelated to ensuring the alien's appearance at deportation hearings and that the regulation deprives aliens of their due process rights by denying them the right to work until deportability is finally determined. Pet. App. 115a. On

[3] Plaintiffs named in the original complaint were 13 nonprofit organizations providing free legal services to aliens with immigration problems, a local United Auto Workers Union affiliate, six named aliens held in detention, and one unnamed alien who claimed to be deterred from filing for benefits by fear that the new regulation would result in indefinite detention. J.A. 18-23. In an amended complaint, one of the alien plaintiffs held in detention was dropped and ten additional alien plaintiffs were added. J.A. 31-41. Four of the additional plaintiffs alleged that a "no-work" condition had been included in their release bonds; six alleged that they were then in detention.

appeal, the court of appeals affirmed in part and reversed in part. *Id.* at 96a-108a. The court held that a nationwide injunction was improper in the absence of class certification, but affirmed the injunction with respect to the named plaintiffs, on the ground that the respondents had a "fair chance" of succeeding on the merits of their statutory argument. *Id.* at 107a. The court remanded for further proceedings on the issue of class certification, and for proceedings on respondents' request for permanent relief. *Id.* at 107a-108a.

On remand, the district court certified a nationwide class and entered a nationwide permanent injunction. Pet. App. 81a-95a. The sole ground for the district court's ruling was that the regulation exceeded the statutory authority granted in 8 U.S.C. 1252(a)(1). Pet. App. 84a, 95a. The court acknowledged that a condition prohibiting unauthorized employment does "further the broad purposes of the Immigration and Nationality Act." Pet. App. 85a. It also acknowledged that the plain language of the statute "appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond." *Id.* at 87a. But it nevertheless held that bond conditions must be limited to ensuring the appearance of the alien at deportation proceedings. *Id.* at 88a-89a, 92a. Quoting the earlier court of appeals opinion, the district court relied on this Court's opinion in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 892-893 (1984), to characterize unauthorized employment by aliens as only a "peripheral concern" of the immigration laws. Pet. App. 92a. The court further faulted the regulation for "inherently preclud[ing] any individualized determination," *id.* at 85a, and held that "the discre-

tion of the Attorney General does not extend to the blanket imposition of a no-work condition on all aliens who are released on bond," *id.* at 95a.

The court appeals affirmed. Pet. App. 71a-80a. Like the district court, it acknowledged the breadth of the statutory language, but held that "legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings." *Id.* at 77a. The court reiterated the view, expressed in its earlier opinion, that the INA is not primarily concerned with illegal work by aliens and that such a purpose would not support the no-unauthorized-work condition on release. *Id.* at 79a-80a. The court of appeals also endorsed the district court's reasoning that the Attorney General must proceed by "individualized determinations rather than the imposition of a blanket condition." *Id.* at 80a.

The government petitioned this Court for a writ of certiorari. In the meantime, Congress had enacted the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. In opposing the petition, respondents argued that enactment of IRCA would make review of the regulation "academic." 86-1207 Br. in Opp. 10 (filed Mar. 31, 1987). This Court issued an order granting the petition, vacating the judgment of the court of appeals, and remanding the case "for further consideration in light of the Immigration Reform and Control Act of 1986." 481 U.S. 1009, 1009-1010 (1987).

The court of appeals then remanded the case to the district court. That court reaffirmed its grant of summary judgment and declined to revise its assessment of the legal issues in light of IRCA. Pet. App. 66a-70a. The court expressed the view that IRCA made the question at hand "a more difficult one," *id.*

at 70a, but adhered to its earlier opinion that the legislative history of 8 U.S.C. 1252(a)(1) limits permissible release conditions to those "aimed at obtaining an undocumented worker's appearance at future immigration proceedings," Pet. App. 68a. The court also reiterated its criticism that the regulation was a "blanket no-work provision that is devoid of individualized determinations as to employment status." *Id.* at 69a.

A divided panel of the court of appeals affirmed. Pet. App. 1a-60a.[4] In light of an intervening ruling by another panel of the same court, *Flores* v. *Meese*, 906 F.2d 396, amended, 913 F.2d 1315 (9th Cir. 1990), withdrawn on grant of reh'g en banc, No. 88-6249 (Nov. 19, 1990), the majority was constrained to recognize that bond conditions are not limited to "the *sole* purpose of ensuring appearance at deportation hearings." Pet. App. 22a-23a. By a somewhat modified and lengthier route, however, the court of appeals arrived at essentially the same result as it had prior to this Court's remand. After distinguishing the circuit precedent noted above, the panel majority used a two-step process to arrive at the conclusion that 8 U.S.C. 1252(a)(1) does not permit release bonds to contain a condition forbidding unauthorized employment. First, after reviewing earlier INS practice and the policies of IRCA, the majority concluded that the Attorney General cannot use detention to prevent aliens from working without authorization. Pet. App. 47a; see also *id.* at 35a (Attorney General has "no authority for *detention* in relation to unauthorized employment"). Second, the majority held that, "where there is no power

[4] Before ruling on the merits of this appeal, the court of appeals issued an opinion rejecting respondents' suggestion that it lacked appellate jurisdiction. Pet. App. 61a-65a.

to detain, conditions must be related to ensuring the alien's appearance." *Id.* at 54a. The court also relied heavily on the conclusion that bond conditions must be based on individualized administrative proceedings rather than on application of a general rule. The majority discussed at length prior decisions dealing with the need for such individualized determinations in cases of aliens detained as security risks, Pet. App. 25a-33a, and concluded that bond conditions "must be based on specific facts regarding the individual" in question, *id.* at 57a. It accordingly ruled that the "blanket condition" represented by the rule at issue would not pass muster, in its view, "even if unauthorized employment were grounds for detention." *Id.* at 57a-58a.

Judge Trott dissented. Pet. App. 58a-60a. Viewing the proper analysis as "uncomplicated," he found that the bond conditions INS seeks to impose by rule are rationally related to "[a]n unmistakable purpose of the [INA]"—*i.e.*, "to preserve jobs for American workers." *Id.* at 58a (quoting *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. at 893). He also reasoned that this purpose was "fortified" by IRCA, and characterized the majority's attempt to find support for its position in IRCA as "thoroughly unpersuasive." *Id.* at 59a. Because the regulation would help prevent continued illegal employment by aliens awaiting deportation proceedings, Judge Trott concluded that "the majority opinion improperly invades the province of the Attorney General." *Ibid.*

SUMMARY OF ARGUMENT

1. Section 242(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(1), grants the Attorney General wide discretion to require "such conditions as [he] may prescribe" on bonds used to

obtain an arrested alien's release pending deportation proceedings. The unqualified language of the statute offers no support for the court of appeals' holding that bond conditions are limited to those related to ensuring the alien's appearance for deportation hearings. To the contrary, Congress replaced a provision permitting release on bond "conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." 8 U.S.C. 156 (1946). The committee reports explaining this change, which now appears in Section 1252(a)(1), indicate that the Attorney General would have "full discretion" and "untrammeled authority" to impose "such conditions or terms as he sees fit." H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950).

The regulation at issue here is well within the Attorney General's wide discretion under Section 1252(a)(1). Since unauthorized employment violates the INA (see, *e.g.*, 8 U.S.C. 1182(a)(14)), forbidding unauthorized work as a condition of an alien's release furthers a core purpose of the immigration laws. Indeed, Congress has often stated—and this Court has recognized—that the preservation of employment opportunities for American workers is one of the foremost purposes of the INA. Congress reiterated this point dramatically in 1986, when it passed the Immigration Reform and Control Act. A release bond condition forbidding unauthorized work protects jobs for United States citizens and lawful resident aliens by deterring illegal entry and reducing incentives to prolong deportation proceedings.

The "no unauthorized work" regulation is based on a long-standing statutory interpretation that merits great deference. Since he first addressed the issue,

the Attorney General has maintained that employment concerns are a proper subject of bond conditions. Although the regulation represents a change in the way his statutory authority is exercised, there has been no change in the Attorney General's view of the scope of that authority.

2. The court of appeals erred in holding that the "no unauthorized work" regulation is an improper "blanket" condition that violates a requirement of "individualized determinations." First, the court mischaracterized the regulation, which contemplates two types of individualized determinations for arrested aliens: a determination whether the alien holds a status entitling him to work, and, if he does not, a determination whether he should nevertheless be granted discretionary work authorization. The discretionary relief referred to in the regulation takes account of a broad range of factors, including hardship on the alien and his family and his likelihood of eventually achieving legal status.

Second, the statute lends no support to the court of appeals' holding that bond conditions can be imposed only in an individual determination regarding the potentially harmful effects of the alien's release. The statute states that the Attorney General may impose "such bond conditions as [he] may prescribe," without indicating whether such conditions are to be "prescribed" in individual hearings or by rule of general application.

Third, even where (unlike here) statutes specifically require individual hearings in contested cases, this Court has recognized the authority of administrative agencies to resolve issues of general applicability through rulemaking. Those precedents support the Attorney General's decision to decide by rule that, in the absence of special circumstances, aliens

in deportation proceedings who lack work authorization should not be permitted to seek employment while released on bond. To compel INS to address such policy issues in each bond proceeding would be pointless, and nothing in the statute requires such a result.

ARGUMENT

I. THE IMMIGRATION AND NATIONALITY ACT AUTHORIZES THE ATTORNEY GENERAL TO REQUIRE THAT, PENDING THE OUTCOME OF AN ARRESTED ALIEN'S DEPORTATION PROCEEDING, ANY RELEASE BOND MUST CONTAIN A CONDITION FORBIDDING UNAUTHORIZED EMPLOYMENT

Section 242(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(1), authorizes the Attorney General to impose "such conditions as [he] may prescribe" in release bonds for aliens awaiting a final decision in deportation proceedings. The unqualified language of the statute and the legislative history of its adoption leave no doubt that Congress intended to grant the Attorney General broad discretion in this area. Barring unauthorized employment through conditions in release bonds falls comfortably within that discretion.

A. The Immigration And Nationality Act Gives The Attorney General Wide Discretion To Impose Conditions In Bonds Obtained To Secure Aliens' Release

1. Congress could not have made any clearer the breadth of the Attorney General's discretion regarding release conditions:

> Pending a determination of deportability * * *, [an] alien may, upon warrant of the Attorney General, be arrested and taken into custody.

> * * * Any such alien taken into custody may, *in the discretion of the Attorney General* and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond * * * *containing such conditions as the Attorney General may prescribe*; or (C) be released on conditional parole. But such bond or parole * * * *may be revoked at any time by the Attorney General, in his discretion*, and the alien may be returned to custody * * * and detained until final determination of his deportability.

8 U.S.C. 1252(a)(1) (emphasis added). If the Attorney General has probable cause to believe that an alien is deportable, he may arrest that alien and take him into custody. Release from custody is within the Attorney General's discretion. If the Attorney General authorizes release on bond, Section 1252(a)(1) expressly provides that the bond may contain "such conditions as the Attorney General may prescribe." Plainly, those conditions may be designed to serve any of the policies of the Immigration and Nationality Act.[5]

The court of appeals effectively read "such conditions as [he] may prescribe" to restrict conditions in release bonds to those necessary to ensure aliens' appearance at deportation hearings. Initially, the court

[5] The Attorney General's wide discretion in carrying out the policies of the INA is further reflected in 8 U.S.C. 1103(a) (emphasis added):

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens * * *. *He shall establish* such regulations; prescribe *such forms of bond*, reports, entries, and other papers; issue such instructions; and perform such other acts *as he deems necessary for carrying out his authority under the provisions of this chapter* * * *.

adopted that reading directly, holding that the Attorney General can impose only those bond conditions "which tend to insure the alien's appearance at future deportation proceedings." Pet. App. 80a; see *id.* at 68a-69a, 88a-89a. In its most recent opinion, the court reached exactly the same conclusion by a more circuitous route. First, the court held that "[u]nauthorized employment has never been held to justify detention." Pet. App. 57a-58a;[6] see also *id.* at 48a. Second, the court held that, "where there is no power to detain, [bond] conditions *must* be related to ensuring the alien's appearance." *Id.* at 54a (emphasis added).

The court of appeals' edict that conditions on release bonds are limited to those related to ensuring appearance at deportation hearings finds no support whatever in the text of 8 U.S.C. 1252(a)(1). The unqualified language of that Section contrasts markedly with the language of other provisions that *do* limit the permissible conditions of release bonds. In the provisions governing bonds in criminal cases, for example, Congress specifically enumerated both the permissible conditions of release and the purpose to be served by those conditions. See 18 U.S.C. 3142(c), (g), and (h).[7] And in the very context of release on

[6] As noted in our reply brief at the petition stage, the bottom two lines at Pet. App. 57a are reversed. See 913 F.2d at 1374.

[7] Notably, Congress has determined that the release bond of a person charged with a crime must be conditioned on the person's not committing any crime while on release. 18 U.S.C. 3142(c)(1). Although Congress has not *required* that the bond of a person charged with an immigration violation must condition release on the person's not committing further immigration violations, the absence of such a requirement is hardly a basis for concluding that the broad language

bond pending deportation proceedings, Congress at one time limited the allowable conditions to those designed to ensure appearance. 8 U.S.C. 156 (1946). The repeal of that provision, and the substitution of the current provision, confirms Congress's intent to authorize the Attorney General to impose any conditions reasonably related to the purposes of the INA.

2. No other provision of the INA supports the court of appeals' restrictive reading of 8 U.S.C. 1252(a)(1). Respondents have argued that a comparison of subsection (a)(1) with subsection (d) supports the court of appeals' decision, because subsection (d)—which applies to persons whose deportations could not be effected within six months of the final deportation order—specifically permits the imposition of "reasonable written restrictions on [the alien's] conduct or activities." See, *e.g.*, Br. in Opp. 15, 20-21.

Contrary to that contention, the differences between subsections (a)(1) and (d) reflect the fact that they address different phases of the deportation process. Subsection (a)(1), at issue here, addresses the phase between initiation and completion of deportation proceedings. It permits the Attorney General to detain persons in such proceedings, or to release them on bond under "such conditions as [he] may prescribe." [8] Subsection (d) addresses situations

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of 8 U.S.C. 1252(a)(1) prohibits the Attorney General from imposing a limited, specific condition of this kind.

[8] Subsection (b) addresses the conduct of deportation proceedings, and does not affect issues of detention or supervision. Subsection (c) addresses the six-month period following a final deportation order, during which time the Attorney General retains the same authority to detain or to impose conditions as under subsection (a)(1).

where the Attorney General does not effect deportation within six months following a final deportation order—a situation that may arise when an appropriate country will not accept a deportable alien. Six months after a final deportation order, the alien may no longer be detained; he is thereafter subject only to "supervision," which may include "reasonable written restrictions" on "conduct or activities." Since aliens may remain subject to "supervision" under subsection (d) indefinitely, see *United States* v. *Witkovich*, 353 U.S. 194, 201 (1957),[9] Congress may well have perceived the need for more specificity with respect to the Attorney General's authority than in the case of a release bond (under subsection (a)(1)) that is tied to a pending proceeding. Thus, there is no inconsistency between the two provisions.

Nor is there merit to respondents' argument (see Pet. App. 46a-47a; Br. in Opp. 22-23) that the At-

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[9] The court of appeals erred in relying on *Witkovich* to support its conclusion that bond conditions necessarily "must be related to ensuring the alien's appearance for deportation." Pet. App. 51a. In placing a limiting construction on the provisions of 8 U.S.C. 1252(d), the *Witkovich* Court noted the indefinite time for which such provisions may be applied and the possibility that a broader construction might deprive aliens of existing First Amendment rights. Neither concern exists here. The regulation challenged in this case applies only during the pendency of deportation proceedings and merely adds an additional disincentive to unauthorized employment that is already illegal. See 8 U.S.C. 1182(a)(14). Moreover, the authority in subsection (a)(1), unlike the authority in subsection (d), is unqualified and contains no language that fairly suggests a limiting construction. See *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)); *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

torney General's authority to impose conditions on release bonds is limited by the sanctions imposed by IRCA. Those sanctions are addressed to *employers* and are designed to prevent them from hiring, *at any time*, aliens who are not authorized to work in this country. 8 U.S.C. 1324a. Section 1252(a)(1), on the other hand, is addressed to the Attorney General, and authorizes him to impose conditions on bonds in deportation proceedings.[10] Thus, neither section can be read as in any way qualifying the purpose, or scope, of the other. Although the court of appeals accurately described IRCA as a "carefully crafted political compromise" designed to take new steps to fight the problem of employment by illegal aliens, Pet. App. 38a, IRCA was enacted against a backdrop of existing provisions that Congress did not alter. Since the Attorney General's authority to require conditions in release bonds is one such provision, there is no basis for the court of appeals' assertion that it is somehow "contrary to a congressional policy." *Id.* at 47a.[11]

3. The legislative history fully confirms the breadth of the Attorney General's discretion in this

[10] IRCA's employer sanctions are codified in "Part VIII—General Penalty Provisions"; Section 1252(a)(1) is codified in "Part V—Deportation; Adjustment of Status."

[11] Moreover, the "employee sanction" that Congress debated and rejected in the course of enacting IRCA provided jail terms for unauthorized work. See *Immigration Control and Reform Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 44-45 (1985); Pet. App. 42a. Those punitive sanctions would have been altogether different from detention under the present regulation—detention that is limited to the duration of deportation proceedings and occurs only if the alien violates the bond condition.

area. Before 1950, the statute permitted release on bond "conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." 8 U.S.C. 156 (1946). In 1949, Congress considered, but did not enact, a bill, H.R. 10, 81st Cong., 1st Sess., that was intended, among other things, to make it easier for the Attorney General to detain some aliens without bond. See generally *Carlson* v. *Landon*, 342 U.S. 524, 538-541 (1952). That bill would also have amended former 8 U.S.C. 156 to provide that, in the case of release on bond, it would be "among the conditions of any such bond * * * that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending against the charge or charges under which he was taken into custody." The reports of both Houses of Congress on this bill stated:

> The bill further provides that *among the conditions* of any bond exacted, * * * there shall be a condition that the alien shall be produced when required for defense against the charges upon which he appears to be deportable * * *. These provisions, of course, enumerate *only one* of the conditions which is mandatory in the bond * * *. *The bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond * * * which he may see fit to include.* Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information. Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in

> greater or lesser amount or other conditions shall be furnished. *The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond * * * pending final determination of the deportability of the alien* * * *.[12]

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949) (emphasis added); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added).

Although H.R. 10 did not pass, the bill—as this Court recognized in *Carlson* v. *Landon*, 342 U.S. at 538-539—was the progenitor of Section 23 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1011. Section 23 specifically amended former 8 U.S.C. 156 to contain the exact language that H.R. 10 would have enacted. In 1952, when Congress comprehensively revised the immigration laws (ch. 477, 66 Stat. 163), former 8 U.S.C. 156 was replaced by Section 242(a) of the new Act, now codified at 8 U.S.C. 1252(a)(1). That is the provision at issue in this case and the one on which INS relied in promulgating the challenged regulation. Although the language in H.R. 10 specifying that "[i]t shall be among the conditions" that the alien appear was not carried into the statute, the legislative history indicates that Section 1252(a)(1), "in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950." H.R. Rep. No. 1365, 82d

[12] The House report also stated more generally that one purpose of the bill was to "return without doubt to the political (executive) branch of the Government certain functions in connection with the exclusion and expulsion of aliens which historically have been vested in that branch, rather than the judiciary." H.R. Rep. No. 1192, *supra*, at 4.

Cong., 2d Sess. 57 (1952).[13] The committee reports signal an unmistakable intention to give the Attorney General "full discretion" and "untrammeled authority" to impose conditions other than a condition that the alien be produced for deportation proceedings. What is more, those reports formed the basis for subsequent legislation *repealing* a statutory provision permitting release on bond "conditioned that such alien shall be produced," 8 U.S.C. 156 (1946), and ultimately *replacing* it with one authorizing "such conditions as the Attorney General may prescribe," 8 U.S.C. 1252(a)(1). The legislative history decisively refutes the court of appeals' limitation of the Attorney General's authority.

The court of appeals ignored both Congress's expansion of the Attorney General's statutory authority and the statements of purpose in the committee reports. Instead, in concluding that the Attorney General's discretion was severely limited, the court of appeals relied on the list of illustrative release conditions contained in the passage from the 1949 committee report quoted above. See Pet. App. 77a-78a, 88a-89a; Br. in Opp. 17. Although the examples stated there do relate to ensuring appearance, there is no basis for reading those examples—even apart from the broad statements that accompanied them—as exhausting the wide-ranging authority conferred by the express language of the statute. On the contrary, this Court has recently admonished that "the language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in

[13] The Subversive Activities Control Act of 1950 is Title I of the Internal Security Act of 1950, and references to Section 23 of either Act are to the same provision.

the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990). Moreover, as noted, the very reports in which these examples appear confirm that the Attorney General was to have "full discretion" and "untrammeled authority to impose such conditions or terms as he sees fit." H.R. Rep. No. 1192, *supra*, at 6; S. Rep. No. 2239, *supra*, at 5.

B. A Condition Forbidding Unauthorized Employment Furthers A Core Purpose Of The Immigration And Nationality Act And Is Therefore Well Within The Attorney General's Discretion

In promulgating the regulation here, INS emphasized that employment-related bond conditions serve "a basic purpose of the immigration laws * * * to protect against the displacement of workers in the United States." 48 Fed. Reg. 51,142 (1983) (quoting *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 555 (A.G. 1974)), Pet. App. 140a. INS explained that the regulation does not interfere with any substantive rights, because it is aimed at "unauthorized work," which is itself "a continuing violation of the immigration laws." *Ibid.*, Pet. App. 139a-140a. The sensible purpose and scope of the regulation bring it well within the Attorney General's authority under 8 U.S.C. 1252(a)(1).

1. It is important to note at the outset the limited nature and intended effects of the regulation at issue. Contrary to the court of appeals' supposition, Pet. App. 7a-13a, INS has consistently maintained that the regulation at issue is not intended to ban *all* employment, but only employment that is "unauthorized." See 48 Fed. Reg. 51,142 (1983), Pet. App. 139a-140a.[14] An alien with permanent resident status is authorized to work as an incident to that status. 8 C.F.R. 274a.12(a)(1), Pet. App. 127a. If INS initiates deportation proceedings against a permanent resident alien, see 8 U.S.C. 1251(a), he may

[14] The court of appeals read the regulation to forbid all work because the body of the regulation did not repeat the caption's description of the regulation as a "[c]ondition against unauthorized employment." Pet. App. 7a. The court then determined that the body of the regulation must be given its "plain meaning" unqualified by the limitation in the caption.

While this determination was not critical to the court of appeals' rationale—as we have noted, the court held that the Attorney General could not condition release even on refraining from *unauthorized* employment—it was, in itself, plainly in error. In the first place, the text of the regulation is not unambiguous, and we believe that its caption *is* relevant to its interpretation. Cf. 2A Sutherland, *Statutes and Statutory Construction* § 47.03, at 121 (N. Singer rev. of C. Sands 4th ed. 1984) (Congress, unlike the English Parliament, "considers and *passes* the entire act including the title, giving authenticity to every component."); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (resolving ambiguity "by the title" of the legislation); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 388-389 (1959) ("The Title of the Act * * *, though not limiting the plain meaning of the text, is nonetheless a useful aid in resolving an ambiguity."); *Maguire* v. *Commissioner*, 313 U.S. 1, 9 (1941) ("While the title of an act will not limit the plain meaning of the text, it may be of aid in resolving an ambiguity." (citations omitted)). Moreover, the INS's reading of its own regulation is entitled to deference, and the court of appeals' refusal to accept that reading was altogether improper—especially in light of the fact that the regulation had been struck down on facial, statutory grounds, before INS had an opportunity to implement it. See generally *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1175-1176 (1991) (courts must defer to agency's construction of its own regulations); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (same).

continue to work until resident status is lost. See 48 Fed. Reg. 51,143 (1983), Pet. App. 142a-143a. As detailed in 8 C.F.R. 274a.12(a) and 274.12(b), Pet. App. 127a-132a, numerous other statuses also convey work authorizations, and those authorizations similarly remain in effect during the pendency of deportation proceedings.[15] If an alien is entitled to work by virtue of his status, proof of that fact will be readily available,[16] and the bond condition will not apply.

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[15] Plaintiffs' contention that work authorization automatically lapses upon the initiation of deportation proceedings, Br. in Opp. 8-9, is flatly incorrect. 8 C.F.R. 274a.14(a)(1) provides that certain employment authorizations for which aliens must specifically apply (those set forth in 8 C.F.R. 274a.12(c)) automatically terminate upon the institution of deportation proceedings. However, that provision does not affect the work authorizations incident to status set forth in 8 C.F.R. 274a.12(a) and (b)—including, of course, the work authorization of an alien with permanent resident status. Furthermore, the termination provision does not deprive *any* alien subject to deportation proceedings of the ability to apply for work authorization pending the outcome of those proceedings. See 8 C.F.R. 274a.12(c)(13), Pet. App. 135a-136a (based on 8 C.F.R. 109.1(b)(8) (1987)).

[16] For example, lawful permanent resident aliens are issued "green cards," which they are required to carry with them at all times as evidence of their status. See 8 U.S.C. 1304(e); 8 C.F.R. 211.1(b); *Saxbe* v. *Bustos*, 419 U.S. 65, 68 (1974). Other aliens holding a status authorizing them to work, see 8 C.F.R. 274a.12(a), will have that status "evidenced by an employment authorization document issued by the [INS]." Aliens in a status entitling them to limited work authorization, 8 C.F.R. 274a.12(b), will generally have that status reflected in a visa. Moreover, each alien's evidence of registration has an "A" number, which can be given to INS to ascertain the alien's status. Thus, an alien who is permitted to work should have no difficulty demonstrating that fact to INS officials responsible for releasing the alien on bond.

The regulation affects only those aliens whose status does not authorize them to work—typically, aliens who have entered this country illegally and are deportable, but who seek discretionary relief such as suspension of deportation under 8 U.S.C. 1254. Those aliens have no right to work in this country. See 8 U.S.C. 1182(a)(14); *Doe* v. *Reivitz*, 830 F.2d 1441, 1450 n.16 (7th Cir. 1987). Accordingly, the regulation conditions their release on their refraining from unauthorized employment during the pendency of deportation proceedings. While such aliens may seek discretionary work authorization,[17] and may en-

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Admittedly, there may be rare cases where unusual circumstances make it difficult to ascertain status. See, *e.g.*, *Liacakos* v. *Kennedy*, 195 F. Supp. 630 (D.D.C. 1961) (factual dispute regarding place of birth, where no birth certificate could be found). However, one of the factors guiding the grant of interim work authorization under the challenged regulation is whether "legal status may ensue in the future." 8 C.F.R. 274a.12(c)(13)(iii). Accordingly, as INS noted previously in an operating instruction issued to its personnel, "[i]ndividuals maintaining a colorable claim to U.S. Citizenship" will normally not be subject to the condition. See Addendum Exhibit A, Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, C.R. 44 (Sept. 7, 1984). Finally, even if it were possible that, on rare occasions, the regulation might temporarily deprive an individual of work authorization to which he in fact had a right, that would not justify the invalidation of the regulation on its face, on either statutory or constitutional grounds. See *American Hospital Ass'n* v. *NLRB*, No. 90-97 (Apr. 23, 1991), slip op. 12; cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976) (due process requirements are shaped by "the generality of cases, not the rare exceptions").

[17] The regulation empowers the district director to grant work authorization pending deportation proceedings to avoid

joy discretionary release on bond, INS has properly refused to condone the "continuing violation of the immigration laws" that occurs if they work without authorization while their deportation proceedings are pending. See 48 Fed. Reg. 51,142 (1983), Pet. App. 139a.

2. Since, as we have shown, the Attorney General's discretion under Section 1252(a)(1) is not confined to ensuring the alien's appearance for deportation hearings,[18] employment-related conditions of the kind required by the "no unauthorized work" regula-

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hardship to other persons or where there is a "reasonable basis for discretionary relief." See 8 C.F.R. 274a.12(c)(13), Pet. App. 135a-136a (formerly 8 C.F.R. 109.1(b)(8) (1984)); see also 8 C.F.R. 274a.12(c)(9) and (10), Pet. App. 134a-135a (specifically providing for discretionary work authorizations for persons who have sought suspension of deportation under 8 U.S.C. 1254 or adjustment of status under 8 U.S.C. 1255). Similarly, any alien who has filed a non-frivolous application for asylum may obtain interim work authorization under 8 C.F.R. 274a.12(c)(8), Pet. App. 134a, and 8 C.F.R. 208.4. We recognize, of course, that not all aliens will qualify for authorization under those provisions. Aliens who do not qualify for discretionary work authorization are in no worse position than any other visitor to this country who is not legally entitled to work; they must depend upon their existing resources, their family and friends, or charity while INS determines their eligibility for discretionary relief.

[18] The panel majority in the court below, citing the Ninth Circuit's earlier ruling in *Flores* v. *Meese*, *supra*, acknowledged that a regulation need not have "the *sole* purpose of ensuring appearance." Pet. App. 22a-23a. But the majority then proceeded to read the *Flores* case so narrowly that the only circumstance in which the majority might possibly countenance any employment-related bond condition would be in the unlikely event that such a condition either helped to ensure the alien's appearance at a future hearing or served to protect the public safety or national security.

tion are plainly valid. These conditions further a core purpose of the Immigration and Nationality Act: to protect the jobs of United States citizens and permanent resident aliens. "One of the main reasons [aliens] come [to the United States illegally]—perhaps *the* main reason—is to seek employment." *INS* v. *Delgado*, 466 U.S. 210, 223 (1984) (Powell, J., concurring). "A primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984).

The Immigration and Nationality Act governs all aspects of admission of aliens to the United States. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27 (1952). See generally *Elkins* v. *Moreno*, 435 U.S. 647, 664-665 (1978). Among other requirements, it conditions the entry of aliens on compliance with limitations related to employment in the United States, thus reflecting Congress's consistent policy to

> provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

H.R. Rep. No. 1365, *supra*, at 51.[19]

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[19] In earlier rulings in this case, the courts below relied on statements in this Court's opinions in *Sure-Tan*, *supra*, and *DeCanas* v. *Bica*, 424 U.S. 351 (1976), in concluding that employment is only a "peripheral" concern of the immigration laws. See Pet. App. 79a, 91a-92a; see also *id.* at 70a. The point of those statements, however, was a more limited one—that the concern of the INA with employment is "peripheral" only in the sense that the INA was not meant to preempt other laws (state and federal) regulating employment generally. See *DeCanas*, 424 U.S. at 360-361; *Sure-Tan*, 467 U.S. at 892-893. Moreover, as noted above, the Court went on,

To implement this policy, the Act conditions entry of each immigrant alien who intends to work in the United States—with the exception of close relatives of U.S. citizens and lawful permanent resident aliens [20]—on the issuance by the Secretary of Labor of a certificate entitling the alien to engage in such work. 8 U.S.C. 1182(a)(14). Aliens who seek to enter the United States for the purpose of engaging in unauthorized employment are excludable, and those who violate the terms and conditions of their entry by engaging in unauthorized employment are deportable. 8 U.S.C. 1182(a)(14), 1251(a)(1) and (9); 8 C.F.R. 214.1(e).[21]

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in *Sure-Tan*, to recognize that "a primary purpose in restricting immigration is to preserve jobs for American workers." 467 U.S. at 893-894.

[20] Section 1182(a)(14) states that it "shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title." The immigrant aliens to which this sentence refers include all immigrants who may be allotted visas under the numerical limitations, except the relatives of citizens or permanent residents specifically listed in 8 U.S.C. 1153(a)(1), (2), (4) and (5).

[21] 8 U.S.C. 1182(a)(14) provides for the exclusion of (and hence, under 8 U.S.C. 1251(a)(1), authorizes the deportation of)

> [a]liens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified * * * that (A) there are not sufficient workers who are able, willing, qualified * * * and available * * * to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

This provision, which applies to all would-be immigrants except for certain persons allowed to enter as relatives of United States citizens or those seeking political asylum, is intended to "provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor." H.R. Rep. No. 1365, *supra*, at 51.

The Act also regulates entry by nonimmigrant aliens—*i.e.*, those seeking to enter on a visa for limited time periods. See 8 U.S.C. 1101(a)(15); 8 C.F.R. 214.1(e). For the vast majority of such aliens, employment is either barred entirely, or is limited by the terms of the visa. For example, representatives of the foreign news media may enter the United States "solely to engage in such vocation." 8 U.S.C. 1101(a)(15)(I). Only narrow categories of temporary visa-holders are given unrestricted employment authorization. See 8 C.F.R. 274a.12(a).

Congress's intent to protect American labor has been expressed repeatedly, and the protections have been increased in successive amendments to the Act. In 1965, Congress shifted primary responsibility for obtaining certification from the Secretary of Labor to the immigrant seeking such clearance. Pub. L. No. 89-236, § 10(a), 79 Stat. 917-918. One stated intent of the amendment was to "strengthen[]" controls to protect the American labor market from an influx of both skilled and unskilled foreign labor." S. Rep. No. 748, 89th Cong., 1st Sess. 15 (1965). In 1976, Congress provided, in 8 U.S.C. 1255(c)(2), that (with limited exceptions) aliens could not become permanent residents if they accepted unauthorized employment before filing their applications for adjustment of status. Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706. The House Committee report explained that this modification would "deter many nonimmigrants from violating the conditions of their admission by obtaining unauthorized employment." H.R. Rep. No. 1553, 94th Cong., 2d Sess. 12 (1976).

Most recently, Congress stressed the centrality of employment concerns to its immigration policies by enacting the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. The "centerpiece" of IRCA is its addition to the INA of a provision imposing sanctions on employers of aliens who are not authorized to work in this country. 8 U.S.C. 1324a; see H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 46, 56 (1985); 132 Cong. Rec. 31,640-31,641 (1986) (remarks of Rep. Bryant). The express goal of the sanctions system is to deter illegal entry by elminating the economic incentive of possible employment. H.R. Rep. No. 682, *supra*, at 46, 56; see *Patel* v. *Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989). Congress plainly recognized the direct link between even the *possibility* of employment in the United States and the strong lure of illegal entry:

> The primary incentive for illegal immigration is the availability of U.S. employment.
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> * * * * *
>
> As long as greater job opportunities are available to foreign nationals who succeed in physically entering this country, intense illegal immigration pressure on the United States will continue. This pressu[r]e will decline only if the availability of U.S. employment is eliminated, or the disparity in wages and working conditions is reduced * * *.

S. Rep. No. 132, 99th Cong., 1st Sess. 1, 8 (1985). The debates on IRCA are replete with references to unauthorized employment as the "lure" or "magnet" that induces aliens to enter the Nation in violation of

our laws.[22] And since Congress recognized that intercepting or locating all illegal aliens is extremely difficult, see S. Rep. No. 132, *supra*, at 7-8, it concluded that the only realistic solution to the problem of illegal immigration is to prevent illegal aliens from working. Employer sanctions serve this purpose, by

> announc[ing] a single and clear message to the world that you should not come here expecting to find a job because, when you get here, you will find that it is illegal to hire you.

132 Cong. Rec. 29,990 (1986) (remarks of Rep. Bryant).

Congress also made clear, during the consideration of IRCA, that one of the preeminent reasons for imposing sanctions and stemming the tide of illegal entrants was to protect the job opportunities of American citizens and lawful immigrant aliens. As one Senator stated bluntly,

> too many Americans, especially young Americans, are out of work[.] * * * [I]t is fundamentally unfair for people who have broken our laws and entered the United States illegally to hold a job at the expense of an American.

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[22] See, *e.g.*, 131 Cong. Rec. 24,306 (1985) (remarks of Sen. Mattingly) ("[T]he promise or even the hope of employment and the economic gain that employment will bring is the strongest lure drawing [aliens] across the border"); 132 Cong. Rec. 29,988 (1986) (remarks of Rep. Mazzoli) ("These people do not come to the United States for our spectacular vistas, our climate, or our clean air. They come to work and to improve their lot in life. As long as work is available, they will continue to come."); see also 131 Cong. Rec. 24,308 (1985) (remarks of Sen. Hatfield); 132 Cong. Rec. 29,981, 29,987, 29,993, 30,009, 30,053 (1986) (remarks of Reps. Rodino, Fish, Berman, Lowery, Scheuer).

131 Cong. Rec. 23,709 (1985) (remarks of Sen. Hawkins). Congress recognized that illegal immigrants take jobs from American citizens and lawful resident aliens, and that the harshest impact is on "low-income, low-skilled Americans, who are the most likely to face direct competition." S. Rep. No. 132, *supra*, at 5; see H.R. Rep. No. 682, *supra*, Pt. 1, at 47. Throughout the debates, Members of both Houses of Congress voiced their concern that illegal immigrants are "taking the jobs of Americans." [23]

In enacting IRCA, Congress also explicitly disavowed the theory that illegal immigrants take only "menial" jobs that American workers do not want and will not take. The Senate committee report, for example, noted that many illegal aliens are in higher-paying jobs, and that many "menial" jobs could be filled by unemployed Americans if employers made an effort to publicize them instead of filling them with illegal aliens. S. Rep. No. 132, *supra*, at 6. As one Senator further stated,

> There is no question that we have substitutions. The most conservative estimate I have seen is that 65 percent of those who come into our country illegally take the jobs of Americans. They take the jobs of low-skilled Americans, generally * * * [that] means 81,000 jobs for the City of Chicago. That is a lot of jobs. Nationally, it is a major problem.

132 Cong. Rec. 33,212-33,213 (1986) (remarks of Sen. Simon).

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[23] 132 Cong. Rec. 29,991 (1986) (remarks of Rep. Smith); see also 131 Cong. Rec. 23,747, 24,307 (1985) (remarks of Sens. Bentsen, Bumpers); 132 Cong. Rec. 30,004 (1986) (remarks of Rep. Fields); 132 Cong. Rec. 33,212-33,213, 33,224-33,225 (1986) (remarks of Sens. Simon, Wilson).

There can be no doubt, then, that the displacement of American workers *is* one of the primary concerns of the immigration laws, that Congress *does* believe that such displacement is a widespread problem, and that Congress has sought to prevent displacement of American workers by those who have come to this country illegally. Those are precisely the policies that the Attorney General has sought to advance through the regulation at issue here. Where an alien who has been arrested for purposes of deportation is unable to establish, through any of a number of reliable and readily-available means, that he or she is authorized by law to work in this country, there is good reason not to allow that person to take a job that might otherwise go to one who is entitled to work.

C. The Attorney General's Interpretation Of His Statutory Authority Merits Substantial Deference

The Attorney General's interpretation of 8 U.S.C. 1252(a)(1) is owed considerable deference and should be upheld if it represents a "permissible" construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The deference due the Attorney General's interpretation of 8 U.S.C. 1252(a)(1) is reinforced by 8 U.S.C. 1103(a). This section, which confers on him broad rulemaking authority in carrying out his statutory duties under the INA (see note 5, *supra*), is an explicit indication that Congress intended the Attorney General to "fill any gap left" in the statute. See *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974).

As the court of appeals noted, Pet. App. 34a-37a, INS did not impose work-related bond conditions prior to the mid-1970s, and then did so only on a

case-by-case basis prior to the promulgation of the regulation at issue. Thus, the present regulation represents a change in the Attorney General's *policy* regarding release conditions, but this shift does not reflect a change in the Attorney General's interpretation of his statutory authority. On the contrary, the Attorney General's view of the *statutory* question posed here has remained the same ever since he first considered it in 1974. In *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 553 (A.G. 1974), the Attorney General concluded that the Act authorizes employment-related conditions:

> The pertinent statutory provisions authorize, in at least some circumstances, the inclusion in appearance-and-delivery bonds of conditions which bar unauthorized employment. However, the use of such conditions should be specifically governed by a published regulation of the Service.[24]

Such a regulation has now been promulgated.

This Court has recognized that the very nature of administrative discretion requires that agencies be permitted to alter policies, within statutory bounds, to accommodate "changing needs." See *American Trucking Ass'ns, Inc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). INS's decision to tighten the policy on release conditions—based on the agency's reassessment of the vexing problem of unlawful employment by aliens—falls well within the broad authority provided by the INA.

[24] The Attorney General did not, in *Toscano-Rivas*, assert an unlimited authority to impose release conditions. Instead, relying on the legislative history of the INA, he concluded:

> It would be unreasonable to construe the quoted language to mean that the Attorney General may impose bond conditions which are totally unrelated to the *various purposes of the immigration laws*, but the reports clearly demonstrate a Congressional intent to grant wide discretion otherwise.

14 I. & N. Dec. at 554 (emphasis added). This position is, of course, the same as that advanced in the present case—*i.e.*, consistent with the overall statutory scheme, release conditions may be used to further any of the substantive policies of the immigration laws.

II. THE IMMIGRATION AND NATIONALITY ACT PERMITS THE ATTORNEY GENERAL TO IMPOSE RELEASE CONDITIONS THROUGH RULES OF GENERAL APPLICATION

After holding that the INA does not authorize a bond condition forbidding unauthorized employment, Pet. App. 47a, 54a, the court of appeals went on to hold that a "blanket" condition would be impermissible "even if unauthorized employment were grounds for detention," *id.* at 57a; see *id.* 17a-18a, 26a-32a, 54a-58a; see also *id.* at 80a, 105a-106a. In so holding, the court of appeals erred both in its characterization of the regulation and in its legal analysis.

A. The court of appeals' characterization of the regulation as imposing a "blanket" condition, Pet. App. 17a-18a, ignores two sets of individualized determinations contemplated by the regulation: an initial, informal determination whether the alien holds some status that makes work "authorized," and a second determination whether, in the absence of a showing of such preexisting authorization, individual factors indicate the appropriateness of temporary work authorization in the particular instance.

As explained above, INS has consistently maintained that the regulation applies only to unauthorized employment—*i.e.*, to arrested aliens whose status does not confer work authorization. See 8 C.F.R. 274a.12(a), 274a.12(b), Pet. App. 127a-132a. Because an alien's status can be readily verified by re-

quired documentation at the time of arrest, and before the initial action setting bond (see note 16, *supra*), the condition will not be applied at all to aliens authorized to work.[25]

In addition, the regulation expressly provides for individualized proceedings, following the initial imposition of the bond condition, in which the alien can request work authorization from the district director for the duration of the deportation proceedings. 8 C.F.R. 103.6(a)(2)(iii), 247a.12(c)(13), Pet. App. 123a, 132a, 135a-136a. This provision is intended chiefly to grant discretionary relief to those persons—such as deportable aliens seeking suspension of deportation—who would otherwise have no claim to work authorization.[26] Relief is available upon a showing that the alien will likely be permitted to remain in this country, that others are dependent

[25] While the regulation does not expressly refer to the availability of such initial determinations, they are inherent in the published intention of INS to apply the bond condition only to "unauthorized" employment, and this intention in turn is consistent with the reference in the regulation's caption to a "[c]ondition against unauthorized employment." 48 Fed. Reg. 51,142 (1983), Pet. App. 139a-140a; 8 C.F.R. 103.6(a)(2)(ii), Pet. App. 123a. Thus, contrary to the court of appeals' conclusions that the regulation applies to all employment (authorized or not), Pet. App. 7a-10a, and that the regulation permits relief from the "blanket condition" only "at some later time," Pet. App. 17a-18a, INS's reasonable construction of the regulation provides for appropriate relief from the outset. See note 14, *supra*.

[26] The provision can also be invoked in those rare cases where an alien claims work authorization by status but is unable readily to document such status. In such cases, a preliminary showing of likely success on the merits of such a claim would be grounds for temporary relief. See 8 C.F.R. 274a.12(c)(13)(iii), Pet. App. 136a.

upon him for support, or that "other equities exist." *Ibid.* Even though the alien bears the burden of establishing the appropriateness of this discretionary relief, he will receive interim work authorization unless the district director makes an adverse adjudication within 60 days of the date of application. 8 C.F.R. 274a.13(d).

B. The court of appeals' requirement of "individualized determinations" lacks any basis in the statutory text. The court stated that the Attorney General's discretion regarding release of aliens on bond "must be exercised on the specific, individual circumstances" of the alien in question. Pet. App. 32a; see *id.* at 57a ("[t]he exercise of discretion under the statute must be based on specific facts regarding the individual related to reasons why he is a poor risk for enlargement upon bail or may endanger the nation while he is at liberty"). The court did not even attempt to anchor this requirement in the language of the statute. The INA itself does not contain *any* language requiring a hearing of any sort on bond determinations.[27] It merely gives the Attorney General discretion to impose "such conditions as [he] may prescribe" on release on bond. The statute is silent as to whether such conditions should be "prescribed" in individualized proceedings or "prescribed" by rule. Under well-established principles, INS is free to act through individualized proceed-

[27] The statute's only express provision regarding hearings is that making habeas corpus proceedings in district court available to arrested aliens. 8 U.S.C. 1252(a)(1). Such proceedings, however, are limited to the grant of relief "upon a conclusive showing * * * that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances."

ings, or by rule, at its discretion. See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). There is simply no warrant for the lower court's conclusion that the statute requires INS to address each and every issue regarding bond conditions in individualized proceedings.

C. Even if some sort of individualized hearing requirement were implicit in 8 U.S.C. 1252(a)(1), the regulation at issue here would be fully consistent with such a requirement. This Court has held that, notwithstanding language requiring a "hearing" or otherwise specifying that an administrative agency must render a decision "in each case," federal agencies may "rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *American Hospital Ass'n* v. *NLRB*, No. 90-97 (Apr. 23, 1991), slip op. 5; see *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 44 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). As Judge Friendly reasoned, in a case involving another section of the INA,

> We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary powers, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering.

Fook Hong Mak v. *United States*, 435 F.2d 728, 730 (2d Cir. 1970).

The INA expressly provides the Attorney General with broad authority to "establish such regulations

* * * as he deems necessary for carrying out his authority under [the INA]." 8 U.S.C. 1103(a). As the Court recently observed in *American Hospital Ass'n* v. *NLRB*, broad language of this sort is "unquestionably sufficient" to authorize rules directing the manner in which statutory discretion is to be exercised, "unless limited by some other provision in" the statute in question. Slip op. 2-3. As noted above, no such limitation exists.

The question of the Attorney General's rulemaking power in this case thus turns entirely on the scope of his authority to impose employment-related conditions in release bonds. As explained in Point I, *supra*, the rule under challenge represents a policy decision that, in the absence of special hardship or other equities, illegal employment by aliens against whom deportation proceedings are pending should be forbidden because it threatens to take jobs away from American citizens and others in this country legally. See 48 Fed. Reg. 51,143 (1983), Pet. App. 142a. The Attorney General could, of course, have chosen to address such issues anew in each individual proceeding, inquiring in each case as to the likelihood that the illegal employment of a particular alien would have an adverse effect on employment opportunities. But the decision not to do this—and to rely instead on a general rule, based on the proposition that unlawful employment tends to reduce opportunities for lawful employment—is well within the competence and authority of the INS.[28] As this Court

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[28] INS's determination, rooted in its own experience with immigration issues, is supported by the conclusions of Congress itself, in its 1986 enactment of IRCA, that illegal employment of aliens takes jobs away from American citizens, particularly "low-income, low-skilled Americans, who are the

recognized in *FPC* v. *Texaco, Inc.*, 377 U.S. at 44, it would be wholly inappropriate to impose on agencies an obligation to address in individual proceedings general policy issues that are better suited to decision by rule:

> To require the Commission to proceed on a case-by-case basis would require it, so long as its policy [remained in effect], to repeat in hearing after hearing its conclusions that [are applicable in each]. There would be a vast proliferation of hearings * * *. We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled.

Ibid. (citations and footnote omitted); see *American Hospital Ass'n*, *supra*, slip op. 5 ("even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability").

The court of appeals offered no reason why the policy choice embodied in the challenged regulation is improper under the INA, other than its own *ipse dixit* that bond conditions *must* be based on individual proceedings, unaffected by rule. Its holding on

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most likely to face direct competition." S. Rep. No. 132, *supra*, at 5; see p. 32, *supra*.

In holding it improper to address these issues by rule, the court of appeals relied on lower court decisions involving denials of bail to individuals claimed to be subversive or otherwise to pose risks to the national security. Pet. App. 25a-33a; see *id.* at 49a-54a. Those cases, however, are inapposite. Whether a particular individual is a security risk is admittedly an inquiry to which individualized hearings are well-suited and perhaps essential. The employment concerns addressed here, by contrast, are policy matters peculiarly well-suited to decision by rule.

this point—like its holding that employment concerns cannot, by themselves, justify the imposition of bond conditions—finds no support in the language or policies of the INA, and improperly restricts the discretion of the Attorney General under that statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, et al.,
Petitioners,
vs.
NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Section 242(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(1), authorizes the Attorney General, "[p]ending a determination of deportability," to release persons arrested "under bond in the amount of not less than $500 with security approved by the Attorney General containing such conditions as the Attorney General may prescribe." The questions presented are:

1. Whether the language and legislative history of section 242(a) discloses an intent to limit the Attorney General's power to detain arrested persons to those situations where detention is necessary to ensure future presence, or to protect the national security or public safety?

2. If section 242(a) does permit the imposition of bond conditions unrelated to appearance, the national security or public safety, whether the section permits a regulation which, in a blanket, non-individualized manner, (i) imposes a bar to employment in all delivery and appearance bonds for persons <u>charged</u> with being deportable, (ii) requires persons arrested but not yet found deportable to establish a "compelling" need to work in order to rescind the employment bar, and (iii) requires detention without bond when someone is <u>suspected</u> of working without authorization in violation of the employment bar?

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STATEMENT OF THE CASE

A. The Challenged Regulation

Pursuant to 8 U.S.C. § 1252, agents of the Immigration and Naturalization Service (INS) arrest persons believed to be present in the United States in violation of the Immigration and Nationality Act (INA or Act). While approximately 97.5% of all such persons opt for immediate "voluntary departure" from the country, those who do not are typically released on bond pending deportation proceedings.

In 1983, the INS promulgated a regulation that directed its agents to release persons pending deportation proceedings only on condition that they not work. 8 C.F.R. § 103.6(a)(2). The regulation provides:

> A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding *** Only those aliens who . . . establish compelling reasons for granting employment authorization may be authorized to accept employment.

8 C.F.R. § 103.6(a)(2) (1983) (emphasis added). The person seeking to have the "no work" bond condition lifted "will have the burden [following release] of going forth with the application to the district director ... Where the 'no work' condition is violated, the appropriate response would be to take the alien into custody." Pet. App. 141 (emphasis added). There are no standards (or hearing of any type) to determine whether the employment is indeed unauthorized. In contested deportation cases this will typically depend on the later outcome of the hearing. INS agrees its regulation will result in a "substantially larger" number of people being detained. Pet. App. at 17a, n. 7.

The district court noted that "all aliens who post bond are automatically subjected to the no-work [bond] condition ... At a minimum, [such] individuals ...

will be unable to work and support themselves until the District Director ... determines that they may do so." Pet. App. 116a (emphasis added).

The regulation and INS's internal Operating Instruction simply bar "employment," not "unauthorized employment." The ten named plaintiffs who were issued bonds were barred from employment, not "unauthorized" employment. J.A. 34-40. The district court concluded that the bond rider inserts "a condition barring employment ..." J.A. at 50. The court of appeals concluded "[i]n the text of the regulation and when put into operation on the face of the bonds, the condition refers broadly to 'employment.'" Pet. App. at 7a (emphasis added).

The challenged regulation permits rescission of the work prohibition only if "compelling reasons" are shown. 8 C.F.R. § 103.6(a)(2)(iii). If compelling reasons are shown, the person "may be authorized to accept employment ..." Pet. App. at 138a.

A previous regulation, not challenged in this case, had provided that, in the discretion of the INS, a condition barring "unauthorized employment" could be imposed in individual appearance bonds. 8 C.F.R. § 103.6(a)(2)(ii), (3)(iii) (1974). The 1983 regulation made several changes to the 1974 regulation: It bars "employment" rather than "unauthorized employment," removes individualized consideration, requires a showing of a "compelling" need to work before the condition may be rescinded, and forfeiture of the bond amount, not detention, was the permissible response to alleged unauthorized employment. *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (B.I.A. 1972), *reconsidered*, 14 I&N Dec. 538 (B.I.A. 1973), *aff'd on other grounds*, 14 I&N Dec. 550 (A.G. 1974).[1]

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1 Prior to 1983 the INS "emphatically disavow[ed]" any intention of detaining aliens who worked without authorization. *Id.* at 542.

B. Early District Court and Court of Appeals' Proceedings

On December 6, 1983, plaintiffs filed this action challenging the 1983 regulation on statutory and constitutional grounds. J.A. 18-23. In an amended complaint, ten additional individuals were added as plaintiffs. J.A. 34-41. Four had been released on bonds containing "no work" conditions pending deportation hearings. J.A. 34, 36-37. The remaining plaintiffs were in detention, unable to secure release because bonding companies would not post security for bonds containing the "no work" rider. *Id.* at 35-40.

The evidence established the following:

1. The "no work" bond rider made it virtually impossible for class members to bond out of detention regardless of their likelihood to appear in future proceedings. The majority of people obtain their release through bonds posted by surety companies. Reporter's Transcript (12-16-83) (RT II) at 46 and 62; C.R. 16, Ex. LL; C.R. 4, Ex. B, ¶ 4. Surety companies would not write bonds containing "no work" riders. C.R. 4, Ex. R ¶ 6,,Ex. S, ¶ 6. *See also* Decision of Court of Appeals, Pet. App. at 15a, 16a, n. 7 (same). "The INS did not contest these claims." Pet. App. at 15a.

2. Prior to implementation of the 1983 regulation the prospect of employment, whether "authorized" or not, had always been one of the "most significant" factors supporting release pending the outcome of deportation hearings. C.R. 4, Ex. E, ¶ 3. *See also* Decision of the Court of Appeals, Pet. App. 34a-35a.

3. The challenged regulation will force people to abandon their statutory and constitutional rights to deportation hearings. C.R. 4, Ex. C, ¶ 3, Ex. D, ¶ 6. It will also significantly increase the number of people forced to appear in proceedings without representation. C.R. 4, Ex. B, ¶ 4(a), Ex. D, ¶ 8, Ex. E, ¶ 6; C.R. 16, Ex. HH; RT II at 134.

4. The regulation as proposed and issued was justi-

fied as a means to combat the "adverse effect of the aliens' employment on U.S. citizens . . ." Proposed Rule, Fed. Reg., Vol. 48, No. 42, page 8820; Pet. App. 139a (final rule).[2] However, the evidence indicates the regulation bears no rational relationship to its intended purpose.[3] Dr. Patricia Hernandez Kelly, an expert on labor migration, described the effect of the regulation akin to "throwing dice." RT II at 114, 116 (emphasis added). Dr. Rebecca Morales, another migration expert, declared that the effect could just as easily be the loss of jobs for United States citizen workers by negatively effecting certain industries and causing their closure. C.R. 4, Exhibit Q.

Based on this record the district court issued a preliminary injunction. Pet. App. at 109a-118a. The court noted that while INS contended "that detained individuals do not have a right to work because of their status as illegal aliens, ... this argument assumes the

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2 INS now states that the challenged regulation is "also [meant] to remove an incentive to delay deportation proceedings when an alien is apprehended." Pet. Bf. 6. However, the penalty imposed by INS's regulation does not distinguish between "delays" in expulsion fully justified because the person might not be an alien, or may not be a deportable alien, and those not similarly justified; nor, for that matter, who is to blame for the delay. At least one recent study suggests that the INS and immigration courts, not those subjected to deportation proceedings, bear most of the blame for delays in concluding hearings. *See, e.g.*, Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, 2 Int'l J. Refugee L. 252, 259-60 (1990) ("majority" of delays caused by Government).

3 Although the INS justified the new regulations as preserving employment for American workers, the regulations eliminated all but one of the labor market considerations set out in the 1974 regulations *See* 8 C.F.R. § 103.6(a)(2)(ii); 48 Fed.Reg. at 8820 (1983).

very fact which the government has the burden of proving and has not yet done so." *Id.* at 116a. The court of appeals affirmed in all pertinent respects. *Id.* at 96a-108a.

On remand the district court granted plaintiffs summary judgment on the ground that the regulation exceeded the statutory authority granted in INA § 242(a). *Id.* at 81a-95a. The district court noted that the challenged regulation prohibited all employment, not just "unauthorized" employment, and the condition was imposed "on all aliens who are released on bond" in a "blanket" manner without any individualized consideration. Pet. App. at 81a, 95a (emphasis added). *See also* J.A. 50-58 (Findings of Fact and Conclusions of Law).

The court of appeals affirmed. Pet. App. at 71a-80a. The INS petitioned for a writ of certiorari. This Court vacated and remanded "for further consideration in light of" IRCA. *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 481 U.S. 1009, 1009-1010 (1987).

C. The Intervening Passage of IRCA

Title I of IRCA adds 8 U.S.C. § 1324a, which imposes penalties on employers who knowingly hire aliens not authorized to be employed in the United States. The language and legislative history of IRCA illustrate that Congress intended to control aliens' employment exclusively through such sanctions. *Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary*, House of Representatives, 92d Cong., Serial No. 13, pts. 1-5, pt. 1 at 46 [emphasis added] ("1971 Hearings"); H.R. Rep. No. 99-682(I) at 51-55, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5649, 5655-60. In fact, Senator Simpson, the primary author of IRCA, specifically rejected a proposal that instead of penalizing the employers of unauthorized aliens, the aliens them-

selves be detained to deter illegal entry for the purpose of working. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45. Senator Simpson criticized the proposal as being "politically harsh, . . . [and] unrealistic . . ." *Id.* at 56. IRCA also continued in effect the provisions of the INA which permit aliens to obtain visas and even relief from deportation regardless of prior unauthorized employment.

D. Post-IRCA District Court and Court of Appeals Decisions

On remand the district court concluded that "the [challenged] bond regulations are aimed at employees, whereas the sanctions in the IRCA target employers." Pet. App. at 70a. The court of appeals again affirmed. First, the court of appeals addressed the question whether the regulation barred employment or "unauthorized employment," and concluded, as had the district court, that it bars all employment. Pet. App. 9a.[4] Next, the court analyzed who was subject to the bond condition and concluded, as had the district court, that it applied to "all those released on bond ..." *Id.* at 10a (emphasis added). Turning to whether "this is a 'blanket provision' [as found by the district court] or a system of individualized determinations," as argued by the INS, the court of appeals held: "This is a blanket condition." *Id.* at 17a-18a.

Turning to the merits, the court of appeals examined the legislative history of § 242, *id.* at 20a-33a, and concluded that INS's detention powers are

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4 The appearance bonds issued by the INS to the named plaintiffs after the challenged regulation went into effect barred employment: "Employment not authorized" and "No employment authorized." *See* attachments to plaintiffs' letter filed Nov. 9, 1989, pursuant to Rule 28(j), Federal Rules of Appellate Procedure.

limited to "the type of harm or danger contemplated in the grant of [the] detention power," *id.* at 33a; nothing in the Act authorizes "detention in relation to employment;" and "nothing suggests the appropriateness of blanket employment-related conditions." *Id.* at 34a (emphasis in original).

Judge Trott issued a short dissent, quoting only one sentence from the legislative history of the 1952 Act. Pet. App. at 58a. However, as with INS's use of the same quote, Pet. Bf. at 27, the significant part of the sentence is dropped. The dissent states that a major purpose of the 1952 Act is to "provide for the protection of American labor ..." Pet. App. at 58a (quoting H.R.Rep. No. 1365, 82d Cong.2d Sess. 51 (1952). Actually, the sentence in the House Report reads: "It is the opinion of the committee that this provision [§ 212(a)(14) which requires that some aliens obtain labor certificates prior to their visas] will adequately provide for the protection of American labor ..." H.R.Rep. 1365 at 1705 (emphasis added).

INS concedes that "the text of the regulation is not unambiguous ..." Pet. Bf. 23 n. 14. Judge Trott agreed: "I am not sure what this case is about." *Id.* . The INS in its brief "assures us that the disputed regulations 'bar only unauthorized employment' * * * I suppose its none of my business, but it seems the way out of this power struggle is for the INS to cure the ambiguities in its regulatory scheme so that the regulations accurately reflect its objective ..." *Id.* at 60a (emphasis added).

SUMMARY OF THE ARGUMENT

I.1 All available authority indicates that the "conditions" the INS may impose under section 242 must be individualized and reasonably related to the alien's availability for hearings, the national security or public safety. *See, e.g.,Carlson v. Landon*, 342 U.S. 524 (1952). *United States v. Witkovich*, 353 U.S. 194 (1957). INS and the Attorney General recognized this

principle in *Toscano-Rivas*, 14 I&N Dec. at 550.

2. In the 1952 Act Congress did not make unauthoriz-ed employment illegal. Provisions relating to relief from deportation and the granting of visas were completely available regardless of prior "unauthorized employment." *See, e.g.*, 8 U.S.C. §§ 1252(b), 1254, 1255, 1259. As this Court has pointed out, "[t]he INA [of 1952] evinces 'at best evidence of a peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (emphasis added) (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)). "[T]he employment relationship between an employer and an undocumented alien is hence not illegal under the INA . . ." *Id.*

3. The INS claims authority to detain whenever detention is "designed to serve any of the policies" of the INA. Pet. Bf. 14. However, each ground of exclusion and deportation expresses a broad policy of the INA. Under INS's interpretation of § 242, it would "serve[] . . . the policies of the [INA]" to detain all people suspected of continuing to hold the status which justifies placing them in proceedings.

4. The INA provides that in deportation hearings the INS bears the burden of proof. INA § 242(b)(4), 8 U.S.C. § 1252 (b)(4); *Woodby v. INS*, 385 U.S. 276, 488 (1966). Contrary to this burden of proof, the challenged regulation presumes that plaintiffs and their class members are deportable aliens and therefore can automatically be barred from working and jailed indefinitely if suspected of working without authorization. The work authorization form which plaintiffs must file in order to terminate the "no work" bond rider requires the applicant to list his place of birth and date, place and manner of entry. *See* INS Form I-765. These forms are then used by the INS to meet its burden of proof. 8 C.F.R. § 242.14. The regulation vitiates the statutory burden of proof.

5. Further indicating that Congress did not intend

to delegate the detention powers assumed by the INS under § 242(a), is the language in § 242(c) concerning aliens found deportable. Unlike § 242(a), § 242(c) specifically permits "release[] on such other conditions as the Attorney General may prescribe." The "other conditions" language is absent from section 242(a). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally ...'" *Russello v. United States*, 464 U.S. 16, 23 (1983).

II.1. Section 242(a) originated as Chap. 29, § 20 of the Immigration Act of 1917. Section 20 provided that "[p]ending the final disposal of the case of any alien ... he may be released under bond ... conditioned that such alien shall be produced when required for a hearing ..." Act of 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917) (emphasis added). Nothing in the language of the 1917 Act indicates that Congress intended to authorize the use of bond authority to control alien employment.

2. H.R. 10, a bill never enacted, was intended "to facilitate the deportation of aliens from the United States," H.R. Rep. 1192, 81st Cong., 1st Sess. (1949), not to control their employment. While its early versions permitted detention without bond for several classes of deportable aliens, including aliens "who entered the United States within ten years preceding the issuance of the warrant of arrest," H.R.Rep. 1192 at 3, by 1950 the version of the bill introduced in the House only authorized detention without bond for criminal and subversive aliens already found deportable. 96 Cong. Rec. 10449 (1950). Representative Hobbs, author of H.R. 10, did not intend the proposed legislation to result in detention without bond for persons, like plaintiffs, charged in deportation proceedings, but only "those that have been finally ordered [deported]." 96 Cong. Rec. 10674 (1950). Furthermore, detention under H.R. 10 was

viewed as a mechanism to effect deportation, not as a mechanism to allow the INS to further other broad purposes of federal immigration policy. 96 Cong. Rec. 10456 (1950) (remarks of Rep. Hobbs).

3. The history of section 23 of the Internal Security Act of 1950 indicates that its purpose was to "deport all alien Communists as a menace to the security of the United States . . ." *Carlson*, 342 U.S. at 541. Section 23, the immediate precursor of § 242(a), read: "Pending final determination of the deportability of any alien ... such alien may ... be released under bond ... It shall be among the condition of any such bond ... that the alien be produced ... when required to do so ..." SACA § 23, *reprinted in* 1950 U.S.Code Cong. & Ad. News 984, 1006. The purpose of the section was to "facilitate the deportation of ... deportable aliens," H.R.Conf.Rep. No. 3112, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. & Ad. News 3886, 3899, 3911, not to control alien employment.

4. The only statement in the House Report regarding detention powers under § 242(a) is that "[t]his provision, in general, follows the procedure establish-ed in section 23 of the Subversive Activities Control Act of 1950." H.R.Rep. No. 1365 at 1711. There is no indication that people facing deportation could be detained without bond for allegedly working without authorization. Congress did state that enactment of 8 U.S.C. § 1182(a)(14), which requires some aliens to receive "labor certificates" in order to obtain visas, would "adequately provide for the protection of American labor against an influx of aliens ..." H.R.Rep. 1365 at 1705 (emphasis added).

5. The legislative history of INA § 103 fails to support INS's regulation. Under § 103 Congress intended only that the Attorney General be "charged with primary responsibility for the administration and enforcement *of the provisions of the bill* . . ." H.R.Rep. No. 1365 at 1687 (emphasis added). While § 103 may

grant authority to further immigration policy through regulations, that authority does not extend to the issuance of regulations impermissible under the INA.

6. Enactment of IRCA further establishes the impropriety of the challenged regulation. Under IRCA applicants for legal status are required to "demonstrate[] a history of employment" in the United States. 8 U.S.C. § 1255a(d)(2)(B)(iii). The "employment" required to qualify is always unauthorized.

IRCA adds to the Act 8 U.S.C. § 1324a, which penalizes *employers* who hire undocumented aliens. 8 U.S.C. § 1324a(a)(1). Congress specifically considered and rejected detention of illegal aliens as a control on unauthorized entry and employment. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45, 56.

III. A statute must be construed, if fairly possible, so as to avoid the conclusion that it is unconstitutional. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set out the test by which to determine what process is due. *Id.* at 335.

This case involves detention without bond. "No right is held more sacred ... than the right of ... free[dom] from all restraint ... unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

INS does not deny the risk of erroneous deprivation. It however asserts that erroneous deprivation will be "rare." Pet. Bf. at 25, n. 16. It will only be as rare as INS limits its arrests to deportable aliens. The vast majority of INS arrests are conducted without warrant during work place "raids" in which "conditions are understandably chaotic ..." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984). The only "procedural protection" offered to avoid erroneous detention is the on-the-spot decision by an INS officer

that someone is working without the right to do so.

The Government's interest in a blanket approach to detention and bond, meanwhile, is *de minimus*. The vast majority of arrested persons—over 97.5 percent—"voluntarily depart" without ever seeking release on bond. *INS v. Lopez-Mendoza*, 468 U.S. at 1044. For those few individuals who do seek release, there could hardly be any greater administrative burden in determining whether a no-work condition is warranted in an individual case than there is in detaining that individual for months on end. In any event, the uncontested evidence indicates that INS's regulation would have no measurable impact on job opportunities for United States workers.

ARGUMENT

I. SECTION 242 DOES NOT AUTHORIZE A REGULATION WHICH IMPOSES A BLANKET CONDITION BARRING EMPLOYMENT IN RELEASE BONDS

The "'starting point [of this inquiry] is the language of the statute . . .'" *Dole v. United States Steelworkers of America*, 110 S.Ct. 929, 934 (1990) (*quoting Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985)). Section 242 is entitled and concerns the "[a]pprehension and deportation of aliens." Subsection (a) is entitled and concerns the "[a]rrest and custody" of persons.

1. All available authority indicates that the "conditions" the Attorney General may impose under § 242 must be individualized and reasonably related to the person's availability for proceedings, the national security or public safety. The discretion granted in § 242(a) must be reasonably exercised upon a consideration of individual factors. *Carlson v. Landon*, 342 U.S. 524. 538 (1952). INS asserts its discretion in setting bond conditions is "untrammeled." Pet. Bf. at 20. However, based upon a review of the history of

section 23, Internal Security Act of 1950, Pub.L. 81-831, § 23, ch. 1024, 64 Stat. 987, 1010-12 (1950), *reprinted in* 1950 U.S. Code Cong. & Ad. News. 984, 1005-07, the precursor of § 242(a), this Court has already rejected this claim:

> [T]he Attorney General is not left with untrammeled discretion as to bail. * * * [He] must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity. * * * This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards.

Carlson v. Landon, 342 U.S. at 543-44 (emphasis added). The Court further made clear that:

> [P]urpose to injure [through Communist activities] could not be imputed generally to all aliens subject to deportation [for Communist activity]. * * * [E]vidence of membership plus personal activity in supporting and extending the [Communist] Party's philosophy concerning violence gives adequate ground for detention * * * There is no evidence or contention that all persons arrested under § 22 of the Internal Security Act, for Communist membership are denied bail.

Carlson v. Landon, 342 U.S. at 538, 541-42 (emphasis added). In *United States v. Witkovich*, 353 U.S. 194 (1957), this Court reviewed the scope of § 242(d), concerning conditions of release for aliens against whom orders of deportation were outstanding for six months. The Court held:

> [O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words [of § 242(d)] become operative ... The preoccupation with the entire subsection . . . is certainly with availability for deportation ... [It is therefore] an appropriate construction to limit the

> statute to ... all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens.

Id. at 199-202 (emphasis added). The INS could hardly enjoy greater power over persons not proved deportable than over aliens already ordered deported.

All cases decided prior to the enactment of § 242(a) make clear that bond decisions must be individualized and relate to the same purposes expressed in *Carlson*.[5] When Congress enacts a new law that incorporates language of a pre-existing law, it is presumed to have knowledge of prior judicial interpretations and to have adopted those interpretations for the purposes of the new law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382, n. 66 (1982).

For the first thirty years following enactment of § 242(a) the Attorney General appeared to recognize and agree with these judicial interpretations. In *Toscano-Rivas*, he was called upon to review a Board of Immigration Appeals (BIA) decision involving a bond condition barring unauthorized employment issued pursuant to 8 C.F.R. § 103.6(a)(2).[6] 14 I&N Dec. at

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5 *See, e.g., United States ex rel. Pirinsky v. Shaughnessy*, 177 F.2d 708, 709 (2d Cir. 1949); *United States ex rel. Potash v. District Director*, 169 F.2d 747 (2d Cir. 1948); *United States ex rel. Zapp v. District Director*, 120 F.2d 762 (2d Cir. 1941); *United States ex rel. Burleigh v. Shaughnessy*, 100 F.Supp. 993, 994 (S.D.N.Y. 1951); *Podolski v. Baird*, 94 F.Supp. 294, 299 (E.D. Mich. 1950); *United States ex rel. Klig v. Shaughnessy*, 94 F.Supp. 157, 160 (S.D.N.Y. 1950); *Ex parte Sentner*, 94 F.Supp. 77, 82 (E.D. Mo. 1950).

6 The BIA is delegated authority by the Attorney General over a wide range of appellate matters involving decisions of immigration judges and INS officials. *See generally* 8 C.F.R. § 3.1(b). After reversing the imposition of the "no work" bond condition in *Toscano-Rivas*, the BIA referred the case to the Attorney General for review of its decision pursuant to 8 C.F.R. § 3.1(h)(ii).

550. INS argued that imposition of the bond condition was justified only by the "peculiar factual situation presented in the case[]," 14 I&N Dec. at 528, including that the apprehended persons were "concededly deportable [and therefore had] no legal right to remain" in the country, and their illegal employment was shown to "deprive American workers of employment ..." *Id.* at 528. The INS "assure[d] [the BIA] that [it did] not intend to use the 'no unauthorized employment' condition indiscriminately in the cases of all aliens here illegally, but only on a carefully selective basis." *Id.* at 528. The Attorney General concluded the bond restriction would be appropriate only "in some circumstances ...":

> For example, there may be cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security. * * * [I]n some circumstances, a bond condition prohibiting unauthorized employment [would be proper].

Id. 553, 556. INS now seeks to indiscriminately impose a "no work" bond rider in all situations.[7]

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7 INS's claim that the "no work" regulation "is based on a long-standing statutory interpretation that merits great deference" is ludicrous. Pet. Bf. 11. As the Attorney General stated in *Toscano-Rivas* in 1974, twenty-two (22) years after the enactment of section 242(a), "no such condition had ever [before] been included in a bond used in connection with deportation proceedings." 14 I&N Dec. at 550. Shortly thereafter the INS promulgated a regulation which authorized imposition of an employment condition in bonds in individual cases, did not require a "compelling" showing to obtain employment authorization and remove the bond condition, and did not require custody without bond for employment believed to be unauthorized. A single abrupt effort at promulgating regulations--more than thirty (30) years after enactment of the purported authorizing statute--does not constitute a

2. In 1952 Congress did not make unauthorized employment illegal. Under the Act, provisions relating to relief from deportation and the granting of visas remain completely available regardless of prior "unauthorized employment." It is unlikely that Congress at the same time intended to grant broad authority to detain indefinitely solely based upon the INS's perception employment is unauthorized.

As recently as 1984, this Court pointed out that "[t]he INA [of 1952] evinces 'at best evidence of a *peripheral concern with employment of illegal entrants.*'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (emphasis added) (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)). An explicit proviso explained that "employment ... shall not be deemed to constitute harboring" under 8 U.S.C. § 1324(a)(3). H.R. Rep. No. 1365, 82d. Cong., 2d Sess, *reprinted in* 1952 U.S. Code Cong. & Ad. News at 1724. "The employment relationship between an employer and an undocumented alien is hence not illegal under the INA . . ." *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 893.

Furthermore, in 1952 Congress did not make obtaining visas or relief from deportation dependent on the absence of prior unauthorized employment. "Suspension of Deportation" remained available to aliens regardless of prior "unauthorized employment." 8 U.S.C. § 1254. "Adjustment of Status," 8 U.S.C. § 1255, a provision permitting certain aliens to obtain resident status without departing the country for the normal interview at a United States consulate, contained no limitation on eligibility for prior "unauthorized employment." 8 U.S.C. 1255(a).[8] It

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consistent interpretation of the statute entitled to any significant deference by this Court.

[8] The INS points out that in 1976 Congress provided, "with limited exceptions," that "aliens could not become permanent residents if they accepted unauthorized employment before filing their applications . . ." Pet. Bf. at 29 (citing Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706). First, this limitation was enacted in 1976, twenty-four years after enactment of § 242(a). Second, the 1976 amendment did not provide that "aliens could not become permanent residents" if they engaged in prior unauthorized employment. They could become residents by obtaining their visas abroad. Third, the 1976 amendment does not effect the ability of the majority of applicants, those aliens with U.S. citizen immediate family members, from obtaining "adjustment of status" regardless of prior unauthorized employment. 8 U.S.C. § 1255(c).

would be illogical to assume that while Congress explicitly allowed aliens to remain in the country and process applications for lawful status despite prior "unauthorized employment," it implicitly intended that they be detained for such conduct.

The INS cites 8 U.S.C. § 1182(a)(14) for the position that "unauthorized employment violates the INA." Pet. Bf. 11. Section 1182(a)(14) only bars the admission of certain aliens unless the Department of Labor "has determined and certified" that there are "not sufficient workers in the country who are able, willing [and] qualified" to perform the services the alien seeks to perform. 8 U.S.C. § 1182(a)(14). In fact, an applicant for admission may qualify under § 1182(a)(14) regardless of prior unauthorized employment. Furthermore, § 1182(a)(14) by its terms does not apply to family-based immigrants, about 80 percent of all immigrants. *Id. See* Opp. Cert. Bf. 2, n. 2.

In 1952 Congress did not amend the statute permitting persons, regardless of status, to obtain Social Security card for employment in the United States. 42 U.S.C. § 405(c)(2)(B) (added by Act of Oct. 30, 1972, Pub. L. 92-603, Title I, § 137, 86 Stat. 1364).

Finally, in IRCA Congress provided for adjustment of status (amnesty) for aliens who had "continuous unlawful residence since [January 1,] 1982." 8 U.S.C. § 1255a(a)(2)(A). Prior unauthorized employment is not a bar to such adjustment of status. In fact,

applicants are required to "demonstrate[] a history of employment" in the United States. 8 U.S.C. § 1255a(d)(2)(B)(iii). Since the applicant must have "unlawful residence since 1982," 8 U.S.C. § 1255a(a)(2)(A), the "employment" required to qualify would always be unauthorized.

In expounding a statute, the judiciary is not guided by a single section, but "'look[s] at the ... whole law and to its object and policy.'" *Dole v. United States Steelworkers of America*, 110 S.Ct. 929, 934 (1990), (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). As we have demonstrated, examination of the "whole law" of 1952 shows that Congress neither made "unauthorized employment" a crime nor a deportable offense nor a bar to qualifying for a visa or relief from deportation. Indeed, looking at the 1952 statute "as a whole," it is clear that Congress did not penalize past "unauthorized employment." It is illogical to assume it nevertheless intended implicitly to grant the INS the power to detain for such activity.

3. The INS claims authority to detain whenever detention is "designed to serve any of the policies of the Immigration and Nationality Act." Pet. Bf. 14. A policy of the INA is to deport aliens "who at the time of entry" were "within one or more of the classes of aliens excludable" at the time of entry. 8 U.S.C. § 1251(a)(1).[9] Similarly, it is a policy of the INA to deport certain aliens because of their conduct and

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9 Classes of excludable aliens include, *inter alia*, those who are "mentally retarded," 8 U.S.C. § 1182(a)(1), those who are homosexuals, 8 U.S.C. § 1182(a)(4) ("psychopathic personality"), those who are "paupers • • • or vagrants," 8 U.S.C. § 1182(a)(8), those "likely to become public charges," 8 U.S.C. § 1182(a)(15), and those "over sixteen years of age • • • who cannot read and understand some language or dialect." 8 U.S.C. § 1182(a)(25).

status. 8 U.S.C. § 1251(a)(1)-(28)(1952).[10] Under INS's interpretation of § 242, it would have the authority to jail without bond all persons awaiting deportation hearings if they are suspected of engaging in the conduct or maintaining the status giving rise to their proceedings in the first place. Such a result is contrary to the policy choice that Congress made in the INA: to deport such aliens only if the INS can meet its burden of proof, but not to imprison them prior to that determination.

4. The 1952 Act provides that in a deportation hearing the INS, not the suspected deportable alien, bears the burden of proof. Section 242(b)(4) provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." 8 U.S.C. § 1252 (b)(4); *Woodby v. INS*, 385 U.S. 276, 488 (1966). If the INS fails to meet its burden, the deportation proceeding is terminated. *See, e.g., Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984). As this Court has recognized, "[t]here is no assurance that a [person] subject to deportation [proceedings] will ever be deported." *Plyler v. Doe*, 457 U.S. 202, 206 (1982).[11]

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10 For example, those who, *inter alia*, "within five years after entry, becomes institutionalized at public expense," 8 U.S.C. § 1251(a)(3), "within five years after entry become[s] a public charge," 8 U.S.C. § 1251(a)(8), or "fail[s] to maintain the nonimmigrant status in which he was admitted," 8 U.S.C. § 1251(a)(9).

11 *See, e.g., Whetstone v. INS*, 561 F.2d 1303 (9th Cir. 1977) (deportation reversed, respondent entitled to permanent resident alien status); *C.M.K. v. Richardson*, 371 F.Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States"); *Liacakos v. Kennedy*, 195 F.Supp. 630 (D.D.C. 1961) (deportation order set aside, respondent a "natural born citizen of the United States"); *Matter of Battista*, Interim Decision 3036 (BIA 1987) (respondent arrested and placed in deportation proceedings in 1983; BIA

Contrary to the statutory burden of proof, the challenged regulation presumes that plaintiffs are deportable aliens and therefore can be prohibited from working. This presumption is carried forward into INS's brief, which erroneously calls plaintiffs "aliens who enter[ed] the United States illegally, and who are [therefore] not authorized to work . . ." Pet. Bf. 5. At one point INS concedes who is really impacted by its regulation: "person[s] charged with immigration violation[s] . . ." Pet. Bf. 15, n. 7. Until the INS meets its burden of proof in the hearing, plaintiffs are entitled to the statutory presumption that they are simply "person[s] charged" with immigration violations.[12]

5. Further indicating that Congress did not intend to delegate the broad scope of authority now assumed by the INS under § 242(a), is the language in § 242(c):

> When a final order of deportation * * * is made against any alien * * * the alien may *** be released on bond *** or released on such other conditions as the Attorney General may prescribe.

8 U.S.C. § 1252(c) (emphasis added).

Section 242(d) provides that as to any alien against

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reverses deportation order four years later); *Matter of Naulu*, Interim Decision 3005 (BIA 1986) (found deportable by immigration judge in 1983; reversed by BIA three years later).

12 Further, the employment authorization form which plaintiffs must complete to terminate the "no work" bond rider requires the applicant to list his place of birth, country of nationality, and date, place and manner of entry into the United States. *See* INS Form I-765, Application for Employment Authorization. These forms are used to meet INS's burden of proof in the deportation hearing. 8 C.F.R. § 242.14. Therefore, INS's challenged regulation, which requires arrested persons to apply for employment authorization to remove the "no work" rider, completely vitiates the burden of proof which statutorily falls on the agency.

whom a final order of deportation has been outstanding for more than six months, such alien shall be subject to supervision by the Attorney General, "includ[ing] ... reasonable written restrictions on his conduct ..." INA § 242(d) (emphasis added).

These sections indicate that Congress intended the Attorney General to have more limited authority under § 242(a) regarding the detention of persons not yet found deportable. Section 242(a) only permits the inclusion of "conditions" in a bond, while sections 242(c) and (d) permit the imposition of "conditions" unrelated to the bond. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

II. THE LEGISLATIVE HISTORY OF SECTION 242 ESTABLISHES THAT THE CHALLENGED REGULATION WAS NEVER INTENDED BY CONGRESS

Legislative intent must primarily, if not exclusively, be judged as of the time of the statute's enactment. *United States v. Wise*, 370 U.S. 405, 411 (1962). *See also United States v. Clark*, 445 U.S. 23, 33 n.9 (1980). INS's repeated reliance on post-1952 legislative statements--*e.g.*, Pet. Bf. 18, 29, 30, 31, 32, 40--should be given little weight.

A. The Immigration Act of 1917

Section 242(a) originated as Chap. 29, § 20 of the Immigration Act of 1917, which granted authority to release individuals on bond pending a deportation hearing. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917). Section 20 provided that pending the final disposal of the case of any alien taken into custody, "he may be released under bond . . . conditioned that such alien shall be produced when required for a hearing ..." Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917). The statute was clearly concerned with appearance for proceedings.

B. The Language and History of H.R. 10

1. H.R. 10 Was Not Intended to Cause Detention Without Bond for Persons Awaiting the Outcome of Deportation Proceedings

Early versions of H.R. 10 would have permitted detention without bond for several classes of criminal and subversive aliens found deportable, as well as aliens found deportable "regardless of the charge ... who entered the United States within ten years preceding the issuance of the warrant of arrest ..." H.R.Rep. 1192, 81st Cong., 1st Sess. 3 (1949). However, by 1950 the House bill eliminated the language authorizing detention of aliens found deportable who entered within ten years preceding the issuance of a warrant of arrest, and limited detention without bond to criminal and subversive aliens. 96 Cong. Rec. 10449 (1950). The bill reported by the Senate Judiciary Committee in July 1950 eliminated entirely the proposal authorizing detention without bond for aliens found deportable, requiring instead that such aliens be convicted of "felonies" for failing to depart the United States. S. Rep. No. 2239, 81st Cong. 2d Sess. at 3. Clearly these developments manifest a withdrawal of the intended scope of the

Attorney General's proposed authority to detain.

Representative Hobbs, the author of H.R. 10, was absolutely clear that he did not intend the proposed legislation to result in detention for persons, like plaintiffs, charged in deportation proceedings, but rather only for "those that have been finally ordered [deported]." 96 Cong. Rec. 10674 (1950).[13] "It is not the deportable aliens; it is those that have been ordered finally deported" that H.R. 10 was meant to authorize the Attorney General to detain. *Id.* at 10675. *See also* 96 Cong. Rec. 10449 (1950) (remarks of Rep. Walter, who introduced the bill). H.R. 10 was not intended to result in the detention of plaintiffs who have not been "ordered finally deported."

2. H.R. 10 Was Intended to Permit Detention "In Aid of Deportation," Not In Aid Of Every Other Purpose The Act Intends to Achieve

It is also clear from the legislative history of H.R. 10 that detention was viewed as a mechanism to effect deportation, not as a mechanism to allow the Attorney General to further other broad purposes of immigration policy. The bill's author stated on the first day of debate that the "one single purpose" of granting the Attorney General additional detention powers in the bill was the "restoration of the sovereign power of our Government to deport criminal aliens ..." 96 Cong. Rec. 10456 (1950). The first sentence of the House Report states that the bill was intended "to facilitate the deportation of aliens ..." H.R. Rep. 1192 at 1.[14]

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13 The broad new detention power of the Attorney general was meant to come into "effect" only "after the warrant of deportation, which is the final step after all the courts have spoken . . . [and the alien has] exhaust[ed] all of his remedies . . ." 96 Cong. Rec. at 10674-75.

14 Through detention, it was believed, aliens found deportable would be encouraged to locate countries that would accept them. 96 Cong. Rec. 10453 (1950) (remarks of Representative Keating).

Under H.R. 10 certain aliens were to be "detained in aid of deportation ..." 96 Cong.Rec. 10677 (1950) (comments of Rep. Hobbs). INS's challenged regulation is clearly not "in aid of deportation," nor is it necessary "to facilitate the deportation of aliens ..."

Finally, INS draws support for its regulation from language in the House and Senate Reports accompanying H.R. 10 which state that the bill intended that the Attorney General shall have "untrammeled authority" to impose such conditions "as he sees fit in releasing an alien under bond." Pet. Bf. at 19-20 (*quoting* H.R. Rep. 1192, 81st Cong. 1st Sess. at 6 (1949) and S. Rep. No. 2239, 81st Cong., 2d Sess. at 5 (1950)). First, as we have already discussed, H.R. 10 was never enacted--for over ten years the Senate refused to even vote on the bill. The primary opposition to H.R. 10 related precisely to the increased detention powers it offered the Attorney General.[15] It is therefore unclear how the INS's analysis is aided by the statement of "untrammeled authority" in the legislative history of H.R. 10. Second, in *Carlson*, in response to the same argument--in fact citation to the same passages in the H.R. 10 reports--this Court stated that "[t]he Attorney General is not left with untrammeled discretion as to bail." *Carlson v. Landon*, 342 U.S. at 543 (emphasis added). Third, the author of H.R. 10 repeatedly stated that his bill was intended to result in detention without bond of certain classes

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15 *See, e.g.* H.R. Rep. No. 1192, 81st Cong., 1st Sess. 17-18 (1950) (minority views of Rep. Emanuel Celler and Rep. Martin Gorski) ("fifth edition of the same bill" would allow overbroad detention of "the good and decent" along with "crooks and subversives"); 96 Cong. Rec. at 10451 (1950) (remarks of Rep. Celler) ("We know that power corrupts, and absolute power corrupts absolutely. We give absolute power here."); 96 Cong. Rec. at 10454 (1950) (remarks of Rep. Marcantonio) (Congress had H.R. 10 before it "for the past 10 years"; Senate refused to consider "violent assault upon the Constitution of the United States").

of aliens found deportable, not aliens arrested and charged with being deportable. The regulation in this case goes far beyond any authority Representative Hobbs intended to grant in H.R. 10.

C. The Language and History of Section 23 of the Act of 1950 Reject Rather Than Support Detention For Unauthorized Employment

In 1950, Congress amended section 20 of the 1917 Act through passage of the Subversive Activities Control Act (SACA), enacted as Title I of the Internal Security Act of 1950. Internal Security Act of 1950, Pub.L. 81-831, § 23, ch. 1024, 64 Stat. 987, 1010-12 (1950), *reprinted in* 1950 U.S. Code Cong. & Ad. News 984, 1005-07. This Act's purpose was to "deport all alien Communists as a menace to the security of the United States . . ." *Carlson*, 342 U.S. at 541. A further purpose was to resolve a conflict between the Circuits regarding whether the Attorney General had "discretion" to detain certain aliens or whether release was a matter of right. *Carlson v. Landon*, 342 U.S. at 538-540. The Sixth Circuit construed the Immigration Act of 1917 to obligate the Attorney General to grant bail. *Prentis v. Manoogian*, 16 F.2d 422 (6th Cir. 1926). The Second Circuit construed the Act as granting discretion to grant bail. *United States ex rel. Potash v. District Director*, 169 F.2d 747 (2d Cir. 1948), and *United States ex rel. Zapp v. District Director*, 120 F.2d 762 (2d Cir. 1941). In the 1950 Act, Congress adopted the construction of the Second Circuit. *Carlson v. Landon*, 342 U.S. at 539-540.

Congress's adoption of the Second Circuit's view does not support the "untrammeled" discretion which the INS now asserts. The Second Circuit's position was stated in *Potash v. District Director*:

> The discretion of the Attorney General ... is interpreted as one which is to be reasonably exercised upon a consideration of such factors,

among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

169 F.2d at 751 (emphasis added). As all courts and the BIA had previously and have since held, bond matters were individualized and custody without bail was limited to considerations of appearance, and danger to the public safety and national security. *United States ex rel. Pirinsky v. Shaughnessy*, 177 F.2d 708, 709 (2d Cir. 1949) ("the issue in each case must be individual"); *United States ex rel. Burleigh v. Shaughnessy*, 100 F.Supp. 993, 994 (S.D.N.Y. 1951); *United States ex rel. Klig v. Shaughnessy*, 94 F.Supp. 157, 160 (S.D.N.Y. 1950); *Podolski v. Baird*, 94 F.Supp. 294, 299 (E.D. Mich. 1950).

Of particular importance to this inquiry is section 23 of SACA, since § 242(a) "in general, follows the procedure established by section 23 of [SACA]." *See* H.R. Rep. No. 1365, *reprinted in* 1952 U.S.Code Cong. & Ad. News at 1711. Section 23 states:

> Pending final determination of the deportability of any alien taken into custody . . . such alien may, in the discretion of the Attorney General ... be released under bond ... with security approved by the Attorney General ... It shall be among the condition of any such bond ... that the alien be produced, or will produce himself, when required to do so ...

SACA § 23, *reprinted in* 1950 U.S.Code Cong. & Ad. News 984, 1006. The language of the statute clearly focuses on bond as a mechanism to insure availability. The conference report states that the purpose of the section was to provide "control over, and facilitate the deportation of, deportable aliens." H.R.Conf.Rep. No. 3112, 81st Cong., 2d Sess., *reprinted in* 1950 U.S.

Code Cong. & Ad. News 3886, 3899, 3911. While *Carlson* interpreted section 23 of SACA to include the authority, in individual cases, to impose conditions of bond relating to the national security, it held the Attorney General's authority was approved only "within the framework of the ... Act to guard against Communist activities ..." *Carlson*, 342 U.S. at 544. The "framework" of the 1950 Subversive Activities Control Act clearly addressed Communist activities as a major threat to the very survival of this nation: "[T]he Communist movement in the United States . . . [seeks the] overthrow of the Government ... by force and violence ... [It presents] a clear and present danger to the security of the United States ..." 50 U.S.C. § 781(15).

Neither the 1950 nor the 1952 Acts address unauthorized employment of aliens in terms comparable to the grave concerns expressed by Congress regarding the subversive threat. While Congress made Communists excludable and deportable, Internal Security Act, Title I, § 2, it did not make prior unauthorized employment a bar to obtaining a visa or relief from deportation. Nothing in section 23 of SACA remotely suggests an intent to grant the Attorney General the authority to impose a blanket condition in bonds barring employment, to require a showing of a "compelling" need to work in order to remove such a condition, or to detain without bond persons believed to be working without authorization.

D. The Legislative History of the INA of 1952

If Congress intended any major changes in the detention power of the Attorney General in the 1952 law, it failed to say so. The House Report states that "[t]his provision, in general, follows the procedure established in section 23 of the Subversive Activities Control Act of 1950." H.R.Rep. No. 1365 at 1711. The report states that pending deportation proceedings the apprehended person may be "continued in

custody, released on bond or released on conditional parole." *Id.* at 1711-12. There is no mention of any authority to place blanket "conditions" in bonds which the Attorney General believes will further the "broad" policies of the Act. There is no indication that people facing deportation could be detained for allegedly working without authorization.

Regarding protection for American workers, the authoritative House Report states:

> It is the opinion of the committee that this provision [section 212(a)(14) which requires that some aliens possess labor certificates prior to obtaining visas] will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor ...

H.R.Rep. 1365 at 1705 (emphasis added).[16]

In the name of further protecting American workers, the challenged regulation permits detention without bond based upon the belief of a local INS official that a person in proceedings--but not yet found deportable--is working without the right to do so. Absolutely nothing in the language or legislative history of section 242 ot the INA of 1952 suggests that Congress intended to grant the Attorney General the sweeping authority to adopt such a regulation.

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16 INS quotes this same passage for the position that it has been "Congress's consistent policy" to protect American labor through the immigration laws. Pet. Bf. 27. The INS however conveniently deletes from its quote that part of the sentence which states that section 212(a)(14) "will adequately" protect that policy.

E. The Legislative History of INA Section 103 Does Not Support INS's Policy-Making in the Area of Detention

The legislative history of INA § 103 affords little help to the INS. Under that provision, according to the authoritative House Report, Congress intended only that the Attorney General be "charged with primary responsibility for the administration and enforcement of the provisions of the bill ..." H.R.Rep. No. 1365 at 1687 (emphasis added). In terms of the issuance of regulations, Congress only intended the INS to "issue such regulations as may be necessary for performing their functions under the provisions of the bill." *Id.*. Authority is limited by "the provisions of the bill." While section 103 may grant the Attorney General the authority to further immigration policy through agency regulations, that authority does not extend to the promulgation of regulations impermissible under the law he is delegated to enforce.

F. Enactment of IRCA Further Establishes the Impropriety of the Challenged Regulation's Penalty for Alleged Unauthorized Employment

While recognizing that later enactments do not explain what Congress had in mind in 1952, we nevertheless set forth below some aspects in which the challenge regulation conflicts with implementation of IRCA. We do so in light of this Court's earlier order remanding for reconsideration in light of IRCA. 481 U.S. 1009, 1009-1010 (1987).

1. IRCA Clearly Distinguishes Threats to National Security From Employment Concerns And Gives The Former Far Greater Importance

One issue present throughout this litigation has been whether because detention is authorized to protect against the activities of Communist subversives it is also authorized to protect against unauthorized employment. IRCA does nothing to aid INS's position

in this regard. Under § 201(a) of IRCA, national security grounds remain non-waivable grounds for denying legalization. 8 U.S.C. § 1255a(d)(2)(B)(ii)(IV). In contrast, IRCA renders inapplicable (not merely waiv-able at the Attorney General's discretion) the grounds for exclusion which govern aliens entering the United States to work without authorization. 8 U.S.C. § 1255a(d)(2)(A); 8 U.S.C. § 1182(a)(14). In fact, under IRCA's amnesty provision applicants are required to "demonstrate[] a history of employment" in the United States. 8 U.S.C. § 1255a(d)(2)(B)(iii). Since, by definition, the applicant must have "continuous unlawful residence since 1982," 8 U.S.C. § 1255a(a)(2)(A), the "employment" required to qualify would, in every case, have been unauthorized. Were there no injunction in this case, thousands of amnesty eligible aliens would have been disqualified because of their inability to "demonstrate[] a history of employment." The structure of the grounds of exclusion and provisions regarding amnesty show that Congress did not consider unauthorized employment the sort of danger to the nation posed by subversives or those threatening the national security.

2. IRCA's Approach to Unauthorized Employment

Title I of IRCA adds 8 U.S.C. § 1324a, which, for the first time, penalizes *employers* who knowingly hire undocumented aliens.[17] Beginning in 1971, the House Judiciary Committee, under the chairmanship of Rep. Peter W. Rodino, Jr., later to become the primary author of IRCA in the House, held extensive hearings on alien employment controls. During these hearing James L. Hennessey, Executive Assistant to the Commissioner of the INS, testified on controlling

17 Employers who violate these restrictions are subject to cease and desist orders and civil fines. 8 U.S.C. § 1324a(e)(4). Contumacious violators are subject to criminal prosecution and injunctions. 8 U.S.C. § 1324a(f).

accused aliens' employment:

> RODINO. [During deportation proceedings] the fact that an illegal alien is a holder of a job or some employment, means that there is no such surveillance on the part of the Service or anybody that he won't be holding the job?
>
> HENNESSEY. He will undoubtedly continue. In fact, having still the right to go before the Board [of Immigration Appeals], I don't think we could attempt or ask for any legislation that he not hold the job. We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him.

1971 Hearings at 46. *See also* Decision of the Court of Appeals, Pet. App. at 43a-44a (regarding similar testimony by other INS officials). The Committee concluded "[t]he illegal entrant should not be subject to additional penalties . . ." *Id.*[18] In floor debates Representative Rodino summarized that "[a]dditional penalties [against immigrant workers] would serve no useful purpose . . ." 118 Cong. Rec. 30155 (1972). Controlling employment exclusively through sanctions against *employers* would remain the approach of all

18 Mr. Rodino expressed his personal opposition to employee sanctions as follows:

> To impose more penalties on illegal entrants in the opinion of the member, would not only be futile but unwarranted.
>
> I recognize the the illegal alien is one who is not the criminal type. He is seeking to find an opportunity, and I think that we have got to act in a humanitarian manner.

1971 Hearings, pt. 4 at 1168-69.

succeeding bills,[19] eventually to be adopted in the IRCA itself.

While IRCA seeks to discourage unauthorized employment through penalties on employers, it clearly does not do so by penalizing aliens with detention. In the months leading up to the passage of the IRCA, Congress specifically rejected detention of employees as a control on unauthorized entry and employment. A witness before the Senate Immigration Subcommittee, research scholar Dr. Barry Chiswick, proposed "detention of the illegal worker" -- rather than employer penalties -- as the vehicle to deter unauthorized employment. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45. Dr. Chiswick offered that such penalties "offer a better hope than ... employer sanctions." *Id.* at 45.

Senator Simpson, Chairman of the Committee and primary author of IRCA, scored Mr. Chiswick's approach as being "politically harsh, ... [and] unrealistic ..." *Id.* at 56. Senator Simpson stated that although it "pointed out that there are some very fascinating ways to present to the subcommittee what we should do about illegal immigration ... it was my thought ... we ought to try the most humane one [i.e. employer sanctions] first ... [I]f we do not get that done, then we will go on to other methods ... [which today] are expressed out of frustration ..." *Id.*

In reporting the IRCA to Congress the House Judiciary Committee declared itself "convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess., at 46 *reprinted in*

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19 For a history of the successive bills, see H.R. Rep. No. 99-682(I) at 51-55, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5649, 5655-60.

1986 U.S. Code Cong. & Ad. News 5649, 5650. The Attorney General concurred, advising the Congress that only through "employer sanctions" can the "entry of illegal aliens into jobs" in the United States "be addressed effectively." Id. at 105.

3. IRCA's "Grandfather" Provision

Further of interest to this Court's earlier remand in light of the enactment of IRCA are the statutory exemptions to employer sanctions allowed by Congress. Formulating what it considered to be a balanced approach to the issue, Congress provided that aliens without work authorization hired at the time of or before the enactment of the IRCA may continue to be employed without penalty on the employer. H. Rep. 99-603(I) at 56; 8 C.F.R. § 274a.7. While IRCA exempts hundreds of thousands of these "grandfathered" workers from the impact of employer sanctions, INS's regulation makes no exemption for them.

Even a casual reading of INS's regulations reveals an attempt to regulate employment specifically left unregulated by Congress. Though the INS may remain "frustrated" over Congress' failure to enact employee sanctions, Senator Simpson, with the full support of President Reagan and both Houses of Congress, flatly rejected jailing alien workers as a means to control their employment. Instead, Congress determined that employer sanctions coupled with improved border enforcement "is the only effective way to reduce illegal entry ... [and] is the most practical and cost-effective way to address this complex problem." H.R. Rep. No. 99-682(I) at 49 (emphasis added).[20] Four adminis-

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20 The House Judiciary Report accompanying HR 3801 states, "This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal

trations and the Select Commission on Immigration and Refugee Policy have recognized the logic of this approach. H. Rep. No. 99-603(I), at 46.

In summary, because the statute as a whole, considered with its legislative history, expresses the intention of Congress to detain on an individualized basis in matters only relating to appearance, availability for deportation and the national security and public safety, this Court should decline to defer to INS's flawed interpretation. *See Dole v. United States Steelworkers of America*, 494 U.S. 26, 110 S.Ct. 929, 938 (1990); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter"). The discussion above has shown that the INS's "detention for alleged un-authorized employment" regulation "is not based on a permissible construction of the statute." *Id.*, at 842-843 (footnotes omitted). The regulation is neither "rational [nor] consistent with the statute." *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987). Neither Congress nor this Court has sanctioned the "'unauthorized assumption by an agency of major policy decisions.'" *Adams Fruit Company, Inv. v. Barrett*, ___ U.S. ___, 110 S.Ct. 1384, 1391 (1990) (*quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (*quoting in turn American Ship Building Co., v. NLRB*, 380 U.S. 300, 318 (1965))).

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immigration, is through employer sanctions." H.R. Rep. 99-682(I), at 46. Congressman Fish, ranking minority member of the House Judiciary Committee, explained that employer sanctions "is the only effective option available" for immigration reform. 132 Cong. Rec. at H9711 (1986).

III. APPROVAL OF THE CHALLENGED REGULATION WOULD RAISE SERIOUS QUESTIONS REGARDING THE CONSTITUTIONALITY OF INA SECTION 242(A)[21]

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score . . ." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). *Accord Public Citizen v. Department of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2566 (1989). In construing a statute that could impair important constitutional rights, this Court has placed special emphasis on this axiom of statutory construction, holding that there must be an "'affirmative intention of the Congress clearly expressed'" that such is the legislature's intent. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979) (emphasis added) (freedom of religion).

This Court should surely pause before imputing congressional intent to regulate employment at the expense of the personal liberty of an entire class of persons; rather it should construe congressional intent underlying the Immigration Act as embracing constitutional values and as being in harmony with this nation's historic respect for the bodily freedom of all but those individuals shown to have abused that

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21 Plaintiffs' complaint includes claims based on Fifth Amendment due process and equal protection. J.A. at 43-44. Complete adjudication of these claims would require an evidentiary hearing on, *inter alia*, the reasonableness of the INS's asserted interests, the extent and nature of harm caused to plaintiffs by the challenged regulation, the risk of erroneous deprivation and the likelihood that additional safeguards would prevent such deprivation. The discussion above and following is only meant to show that INS's interpretation of section 242(a) raises serious constitutional questions.

freedom following a due process hearing.

For purposes of this analysis it matters little whether the condition is defined as barring "employment" or "unauthorized employment." The INS, as stated repeatedly in its brief, considers plaintiffs and their class members to be illegal aliens not authorized to work. Pet. Bf. 5 ("aliens who enter the United States illegally, and who are [therefore] not authorized to work"); *id.* at 6 ("burden [of the regulation falls] on these aliens"); *id.* at 35 (class members are "arrested aliens whose status does not confer work authorization"). When the person contesting deportability considers himself authorized to work, and does so following release without first applying for and receiving employment authorization from the INS, functionally it matters not whether the one considers the regulation to bar "unauthorized" employment or all employment. Under these circumstances INS considers all employment to be unauthorized; and all employment following release without first obtaining permission from the INS a basis for detention without bond.

A. INS's Imposition of Jail Without a Hearing Violates Plaintiff's Procedural Due Process Rights

Heretofore, this Court has approved prolonged detention without trial only upon a prior individualized finding in a due process hearing that there are good and sufficient grounds to detain. *E.g., United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set out the following test by which to determine what process is due:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Application of the *Mathews* formulation to the regulation at issue demonstrates that grave doubts about the constitutionality of § 242(a) would be the inevitable consequence of interpreting the statute as authorizing the indiscriminate prohibiting of employment for persons facing deportation proceedings and their jailing without bail for suspected violation of the prohibition, all accompanied with no due process hearing.

1. The right to bodily freedom is of unsurpassed importance.

Determining what process is due first involves assessing the importance of the private interest at stake. Here the INS has made it abundantly clear that the penalty for violating its work restrictions is re-arrest and incarceration until deportation proceedings are completed. Pet. App. 141 ("[w]here the 'no work' condition is violated, the appropriate response would be to take the alien into custody").[22] An individual

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22 In fact, the unrebutted evidence further established that the mere imposition of the "no work" rider in the bond would prevent many people from obtaining release following arrest as most bond companies will refuse to underwrite securities under such circumstances. Pet. App. at 15a, n. 7. That the challenged regulation would result in a "substantially larger number" of people being detained pending the outcome of deportation proceedings was deemed an "acceptable consequence" by the agency. *Id.* at 15a and 17a, n. 7.

committed to INS jails through operation of this no-work condition is obviously deprived of bodily liberty.

In the hierarchy of constitutional rights, bodily liberty is second only to life itself. "Inviability of the physical person is universally put first among the demands made by the individual." 3 Pound, *Jurisprudence* 33 (1959). As this Court has held,

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

The first element of the *Mathews* balancing test, therefore, tips decidedly in favor of requiring at least some procedural protection before the extended restraint on liberty occasioned by the INS's challenged regulation.

2. Blanket imposition of a condition of release creates an unacceptable risk that individuals will be needlessly incarcerated

INS recognizes the risk of erroneous deprivation of personal liberty resulting from the non-individualized nature of its regulation. It simply asserts, without an evidentiary basis, that erroneous deprivation will be "rare." Pet. Bf. at 25, n. 16. It will only be as rare as INS limits its arrests to deportable aliens. The vast majority of INS arrests are conducted without warrant, often during work place "raids" during which "conditions are understandably chaotic . . ." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

The only "procedural protection" offered to avoid erroneous detention without bond is seemingly the on-the-spot determination by a local INS officer that someone found working during an INS enforcement

operation is doing so without a right to do so. The officer will seemingly make a judgment call regarding the likely outcome of the person's pending deportation hearing. If the officer believes the INS will win the deportation hearing several months or years down the road, he will conclude the person has no right to be employed and effect his detention without bond for violation of the original bond condition.

As this Court has repeatedly held, such a determination, even if based upon probable cause, cannot constitutionally serve as a predicate for prolonged detention. *Gernstein v. Pugh*, 420 U.S. 103, 113-14 (1975); *County of Riverside v. McLaughlin*, __ U.S. __, 111 S.Ct. 1661 (1991).

The INS seeks to overcome this procedural void by permitting individuals to apply for "discretionary" work authorization. To begin with, such work authorization is available only after an arrestee is released (on condition, of course, that he or she not work before applying for and receiving the permission to do so). 8 C.F.R. § 274a.12(c)(13). For the many individuals who cannot deposit bail in cash, this first hurdle is effectively insurmountable: bonding companies uniformly refuse to underwrite bail bonds for respondents whose release is conditioned on unemployment. C.R. 4, Exhibits B and C ("Bond companies have made clear that they will not place bonds ... if the condition of the bond prohibits the client from employment"). *See also* Pet. App. at 17a, n. 7 (court of appeals notes that large numbers of people will be unable to "secure immigration bonds and will be detained indefinitely"). Eleven of the plaintiffs were in INS detention, unable to secure their release because of the challenged regulation when this lawsuit was commenced. C.R. 13 at 8-16.

Further thinning the ranks of individuals who could ever hope to qualify for discretionary work authorization, INS regulations insist that an applicant "establish compelling reasons for granting

employment authorization." 8 C.F.R. § 103.6(a)(2)(iii) (1989) (emphasis added). In practice the INS has proved unflaggingly faithful to the parsimonious terms of its regulation.[23]

The regulations themselves allow the INS up to 60 days within which to adjudicate applications for employment authorization. 8 C.F.R. § 274a.13(d). Sixty days is clearly not a short time to be erroneously deprived of the right to work. The uncontroverted record, however, establishes that the agency routinely delays 7-8 months before deciding applications for employment authorization. C.R. 16, Exhibit CC; *id.* Exhibit RR ("Based on current practice [in San Francisco] ... it could take years before ... applications for permission to work would be adjudicated"). *See also Doe v. Meese*, 690 F.Supp. 1572 (S.D. Tex. 1988) (INS failing to adjudicate request for employment authorization within regulatory time limits); *Mendez v. Thornburgh*, No. 88-04995-TJH (C.D. Cal) (class action challenge to INS's failure to adjudicate requests for work authorization within regulatory time limits).

No due process attaches to a determination of an application filed by a class member. There is no hearing, no independent decision-maker, no witnesses, no opportunity for rebuttal of derogatory evidence and no record. There might, sometimes, be an informal interview.

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23 *See, e.g.*, C.R. 16, Exhibit GG (Los Angeles District Office has "blanket policy" to deny applications for discretionary work authorization); C.R. 16 (Exhibit CC ¶ 4) (8 months to receive a decision); C.R. 16 (Exhibit DD, ¶ 4[g]) (no criteria; 80% denial rate); C.R. 16 (Exhibit GG, ¶ 4) (same); C.R. 16 (Exhibit OO ¶ 6) (same); C.R. 16 (Exhibit PP ¶s 7-9) (same); C.R. 16 (Exhibit RR ¶ 5) (often takes "years" to receive a decision). *See also Ramos v. Thornburgh*, 732 F.Supp. 696 (E.D. Tex. 1989) (INS overly stringent in adjudicating applications for employment authorization); *Diaz v. INS*, 648 F.Supp. 638 (E.D. Cal. 1986) (INS considers impermissible factors in denying applications for employment authorization).

In short, "discretionary" work authorization is but a carrot on a stick, a specter of due process.

Incarceration for violation of no-work conditions is similarly imposed with utter disregard for fair procedure. INS regulations prescribe the "process" as follows:

> When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge [*i.e.*, chief border patrol agent, deputy chief patrol agent, associate chief patrol agent, or assistant chief patrol agent] . . . in which event the alien may be taken into physical custody and detained.

8 C.F.R. § 242.2(e) (emphasis added). *Compare* 18 U.S.C. § 3148 (bail may be revoked only "after a hearing" in which judicial officer finds "clear and convincing evidence that the person has violated . . . condition of release").

That an individual's most precious personal liberty could be violated at the unfettered discretion of this long list of administrative functionaries might be expected in the pages of Kafka, but not in the United States. In addressing the analogous authority of Article III judges, this Court cautioned,

> A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial.

Bitter v. United States, 389 U.S. 15, 16-17 (1967) (emphasis added). The Court held that revoking bail cannot be tolerated unless (1) a hearing, and (2) a statement of the court's reasons for revoking bail are first provided. *Id.*

True, pursuant to 8 C.F.R. § 242.2(d), an individual whose freedom is summarily revoked for working may petition for a "redetermination" hearing before an administrative judge. 8 C.F.R. § 242(b). But once an individual manages to request a redetermination, he or she must wait from a few days to "two months or more" before actually receiving that procedure. RT II at 29; RT II at 138. And, without the ability to work, the procedure would have to be invoked by most people without the assistance of counsel.

The INS itself characterized bond redetermination as "informal" and not a due process hearing. R.T. 130, line 15.[24] No record is made: "The Government has never represented . . . that a transcript was made of the bond hearing." R.T. at 19, lines 11-14. The person incarcerated is not permitted to testify, present witnesses, or rebut derogatory evidence. E.R. 18-19, C.R. 16 Exhibit AA ¶¶ 10-11; E.R. 23, C.R. 16 Exhibit DD at 11; R.T. 130, line 15; R.T. 32, line 22; R.T. 42, lines 3-14; R.T. 130, Line 20; R.T. 132, line 16.

As the district court held, the administrative avenues available to a person whose bond is revoked for working are "not designed to comport with due process requirements . . ." App. Pet. 117a. The district court concluded that the INS's procedural scheme posed a "significant risk of erroneous deprivation . . ." *Id.*

In sum, plaintiffs and their class members may be summarily re-arrested for allegedly violating a no-work

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24 *See also* R.T. 32, line 22; R.T. 42, lines 3-14; R.T. 130, line 20; R.T. 132, line 16; C.R. 16 (Exhibit AA at 3); C.R. 16 (Exhibit DD at 11 lines 6-28).

condition without the INS's ever having to convince a neutral or detached decision-maker that the individual is an alien, deportable, a danger to the public, or in fact has worked or will work without authorization if enlarged on bond. There is no prompt due process hearing at which someone detained under the no-work regulation may challenge his or her detention.

The second element of the *Mathews* due process formulation, therefore, strongly disfavors the blanket imposition of no-work restrictions on release.

3. The Government's interest in imposing a blanket no-work condition is attenuated at best

The Government's interest in a blanket approach to detention and bond, meanwhile, is *de minimus*. To begin with, providing some type of due process hearing before imposing no-work conditions or detention for their violation would place no great administrative burden on the INS: the vast majority of persons the INS arrests—over 97.5 percent—"voluntarily depart" the United States without ever seeking release on bond at all. *INS v. Lopez-Mendoza*, 468 U.S. at 1044. For those few remaining individuals who do seek release, there could hardly be any greater fiscal or administrative burden in determining whether a no-work condition is warranted in an individual case than there is in detaining that individual for months on end. Indeed, in more sober times the INS acknowledged as much.

In *Toscano-Rivas*, the Attorney General held that a no-work bond condition cannot be imposed without adequate "safeguards." 14 I&N Dec. at 556-57. According to the Attorney General, regulations must limit "the circumstances which might result in imposing an employment condition. Such standards would provide guidance to Service personnel ... and would be a safeguard against abuse of discretion." *Id.* at 557. As we have discussed above, between 1974

and 1983 the INS adhered to regulations, promulgated after the Attorney General's decision in *Toscano-Rivas*, that required individualized determinations and the consent of an INS regional commissioner before barring employment.

In 1983, the INS suddenly decided that its former procedures were too "burdensome." However, no proof of this assertion has ever been presented, for none exists. For its part, the Board of Immigration Appeals characterized these procedures as allowing for "prompt and equitable bond determinations." *Matter of Leon-Perez*, 15 I&N Dec. 239, 241 (BIA 1975) (emphasis added). The Board, speaking for the Attorney General, thoughtfully acknowledged that unless individual factors are weighed, a no-work condition could needlessly force the individual to "choose between violating the employment condition of his bond in order to support himself, seeking social assistance, or absconding . . ." *Id.* at 242-243.

The INS's reasons for abandoning this prior practice remain an enigma. In over eight years of litigation, the INS failed to produce any evidence that its pre-1982 practice of imposing no-work conditions in individual cases was in fact burdensome. What prior INS practice does make abundantly clear, however, is that the agency is well-able to provide meaningful process before imposing no-work conditions.

Secondly, unlike society's ancient and universal interest in protecting the citizenry from violent crime and the nation from subversion, the governmental interest in barring the employment of unauthorized workers is qualified at best. Regulating the employment of unauthorized aliens has only been of public interest since enactment of the IRCA in 1986, and even now alien employment is hardly deemed so pernicious as to warrant a categorical ban: the IRCA provides that continuing to employ unauthorized workers hired before November 6, 1986, is permissible, Immigration Reform and Control Act of

1986, Pub.L. 99-603, § 101(a)(3), 100 Stat. 3360 (1986), as is hiring unauthorized workers as "independent contractors" or "casual domestic" laborers. 8 C.F.R. § 274a.1.(f). Similarly, Congress has permitted agricultural employers to continue to employ unauthorized workers long after other employers were barred from doing so. 8 U.S.C. § 1324a(i)(3)(A). In short, Congress's qualified prohibition on the employment of unauthorized aliens belies any attempt to equate working with dangerous crime or subversion threatening the life of the nation.[25] The final element of the *Mathews* test, then, also weighs against the INS's indiscriminate imposition of no-work conditions.

4. Administrative agencies may regulate economic activities through blanket rules, but impairing personal liberty through a blanket bond condition is impermissible

The INS points to decisions involving administrative rulemaking in the sphere of economic regulation, *e.g.*, *American Hospital Association v. NLRB*, __ U.S. __, 111 S.Ct. 1539 (1991), to support its notion that detention may be prescribed by rule for a broad class of individuals. This reliance is misplaced.

In *American Hospital Association*, this Court upheld a NLRB rule generally limiting to eight the

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25 Even where the governmental interest in protecting the citizenry from violent criminals is at stake, this Court has approved extended restraints on personal liberty only following a due process hearing. *United States v. Salerno*, 481 U.S. 739 (1987). *See also* S. Rep. No. 98-225, at 8 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3191 (pretrial detention constitutionally defective unless (1) imposed with adequate procedural safeguards, and (2) limited to those cases in which detention is strictly necessary to serve important societal interests).

number of bargaining units it would recognize at any given acute care hospital. The Board's purpose was to balance the right of hospital employees to define their own bargaining units with their employers' interest in negotiating with a manageable number of bargaining units. 111 S.Ct. at 1544-45. Nothing prevented the Board from "'supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents . . .'" *Id.* at 1543 (quoting K. Davis, *Administrative Law Text* 145 (3d ed. 1972)).

Unlike *American Hospital Association*, neither experience, analysis, nor reason supports the regulation here at issue. The INS has managed to produce no evidence that jailing a class of individuals is warranted by any substantial administrative concern (or even that its regulation would contribute anything to the employment of U.S. citizens).

Perhaps more importantly, the *Mathews* due process formulation turns in great part on the importance of the individual right at stake. Here we do not speak of bargaining units—we speak of the bodily freedom of individual human beings.

However much the Attorney General may be empowered to impose no-work conditions in proper cases, that power should be exercised with due regard for the freedom of the individual against whom it is applied. If an administrative agency is to commit an individual to an indefinite period in jail without trial, it should, at a minimum, show in a due process hearing that permitting that person to remain free on bond would be inimical to the public good. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963). This nation's historic solicitude for individual freedom simply cannot be squared with the INS's interpretation of § 242(a) as comprising an undiscriminating, unindividualized class determination to condition the freedom of virtually every individual it

arrests on the withdrawal from work.

B. The Detention Caused by the Challenged Regulation Constitutes An Impermissible Penalty

The challenged regulation appears to be unconstitutionally punitive as well. This Court has consistently affirmed that "under the Due Process Clause, a [person] may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

The INS would now imprison alleged immigrants for working in the United States without authorization. No legislature has made working a crime, nor has any elected body declared incarceration the penalty for such an "offense." Here the INS, by dint of administrative discretion, has taken it upon itself to decree work an offense and to prescribe incarceration as its punishment—all without trial or other due process. In so doing, the agency exceeds the bounds of the Due Process Clause of the Fifth Amendment.

"To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." *United States v. Salerno*, 481 U.S. 739, 747 (1987). In its comments to the final regulation the INS declared that its no-work rule will punish un-authorized workers who take jobs. Without a no-work prohibition, the agency reasoned, "upon release, the [person] could simply continue his employment with impunity ..." 48 Fed. Reg. 51,144 (1983); Pet.App. 140a (emphasis added).[26] The intent of the no-work regulation, then, is expressly punitive. The INS wishes to re-incarcerate persons released on bond

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26 Of course, through its system of employer sanctions, Congress has effectively addressed the possibility that an individual released on bond might engage in unauthorized work.

who work so that their working will not go with "impunity": that is, "protection from punishment." *Black's Law Dictionary* at 891 (4th ed. 1968).

But even absent such an express punitive intent, due process protects against penalty-in-fact:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter* *** whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . .

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Under *Mendoza-Martinez* the INS regulation is palpably punitive.

Firstly, there is no question but that imprisonment involves an affirmative disability or restraint that has historically been regarded an infamous punishment. *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896). Secondly, the regulation looks to a past infraction—working—as a basis for imposing a future disability—imprisonment. Under the regulation, the INS will deny release to anyone who refuses to accept unemployment as a condition of release. Where the individual accepts this condition and is released, working without first obtaining permission results in re-arrest and incarceration.

Because the regulation prescribes imprisonment for a past act that has nothing to do with the imprisoned individual's availability for deportation, it is operationally punitive. *Bitter v. United States*, 389 U.S. 15, 17 (1967).

Jailing individuals to keep them from delaying deportation is patently excessive: no individual has any right to delay deportation proceedings except "for

good cause shown." 8 C.F.R. § 242.13 (1990).[27] Predictably, there is absolutely no evidence in the record that the regulation furthers this asserted purpose. Similarly, there is no evidence that the challenged regulation in any way creates job opportunities for American workers.

In *Bitter v. United States*, 389 U.S. 15 (1967), the trial judge revoked the bail of a defendant who returned 45 minutes late from a recess. This Court held such bail revocation unconstitutionally punitive:

> A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial *** But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial. *** [T]he trial judge's order of commitment *** had the appearance and effect of punishment rather than an order designed solely to facilitate the trial. Punishment may not be so inflicted.

389 U.S. at 16-17 (emphasis added). As in *Bitter*, here the INS would jail individuals released on bail entirely without hearing or any statement of reasons for commitment. Such incarceration would have nothing to do with protecting the integrity of the administrative deportation process. Jailing individuals who work in violation of the INS's wishes, therefore, is transparently punitive—and unconstitutional.

CONCLUSION

The decision of the Court of Appeals should be affirmed. If the decision is reversed, the case should

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27 *See also* 8 U.S.C. § 1252b(d) (Attorney General may sanction frivolous delay); 8 C.F.R. § 3.1(d)(1-a)(iv) (BIA may dismiss frivolous appeal of order of deportation).

be remanded to the district court for trial on plaintiffs' constitutional claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents' arguments are built on a fundamental misinterpretation of the regulation at issue in this case. Respondents assert that the regulation forbids all aliens from working pending determination of deportability, even though the text of the regulation and the notice of promulgation provide that the "no work" condition applies only to aliens who are not authorized to work. Respondents go to challenge the validity of their hypothetical regulation banning authorized employment based on the legislative history of a provision unrelated to the one on which the Attorney General relies for his authority. They seek additional support from judicial decisions that address the circumstances under which an alien may be held without bond, rather than what conditions may be imposed in a bond. Respondents' legal argument is, on a fair reading of the regulation, largely beside the point.

On one point, however, respondents' argument is on target. They now appear to agree with us that the court of appeals erred in concluding, Pet. App. 37a-54a, that

the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which imposes sanctions on employers for hiring aliens who are not authorized to work, 8 U.S.C. 1324a, restricts the authority conferred on the Attorney General in 1952 to impose conditions on release bonds, 8 U.S.C. 1252(a)(1). Respondents reject "post-1952 legislative statements" because "[l]egislative intent must primarily, if not exclusively, be judged as of the time of the statute's enactment." Resp. Br. 21. Respondents thus seem to reject, Resp. Br. 29, one of the key rationales underlying the court of appeals' decision. This Court should also conclude that Congress's enactment of additional measures to combat unauthorized employment in 1986 did not circumscribe the Attorney General's preexisting authority to promulgate a bond condition forbidding unauthorized employment.

1. Respondents assert that the regulation at issue in this case forbids all aliens from working as a condition of their release on bond pending determination of deportability. Resp. Br. 1-2. That is not true.

a. After an alien is arrested pursuant to an order to show cause, 8 C.F.R. 242.1, the district director (or his designee) determines, pursuant to 8 C.F.R. 103.6, Pet. App. 123a, whether the alien is authorized to work. If the alien is authorized to work, the district director releases the alien on bond without any condition requiring him to refrain from work. That is because the regulation only imposes—as its caption plainly states—a "[c]ondition against *unauthorized* employment." *Ibid.* (emphasis added). If the alien is not authorized to work, however, the district director releases the alien on bond with the condition "Employment not authorized" or "No employment authorized." Resp. Br. 6 n.4.

Respondents infer from the wording of the bond condition, and from the body of the regulation (which refers to "[a] condition barring employment," Pet. App. 123a) that the regulation bars all employment, rather than just unauthorized employment. Resp. Br. 1-2. This reasoning ignores the fact that the district director imposes the

"no work" condition only *after* he determines that the alien is in fact not authorized to work. That determination is implicit in the condition "Employment not authorized." Resp. Br. 6 n.4. It is assumed in the notice of promulgation (which states that "permanent resident aliens are *not* affected by these release conditions" because "the permanent resident alien has the right to work in the United States," 48 Fed. Reg. 51,143 (1983), Pet. App. 142a-143a (emphasis added)). And it is compelled by the caption of the regulation, which requires district directors to impose only a "[c]ondition against *unauthorized* employment." 8 C.F.R. 103.6, Pet. App. 23 n.14. Tellingly, respondents do not even mention—let alone explain the significance of—the caption of the regulation. The agency's reading of its regulation is entitled to deference, see Gov't Br. 23 n.14, especially where, as here, the regulation has been held invalid before the agency has had a chance to implement it.

b. Respondents seem to recognize that the district director must "determine whether the employment is indeed unauthorized," for they complain that there are "no standards (or hearing of any type)" to make that determination. Resp. Br. 1. This new complaint is also untrue. As we explained in our opening brief, an alien's authorization to work is a function of his immigration status (the statuses authorizing an alien to work are set forth at 8 C.F.R. 274a.12(a) and (b), Pet. App. 127a-132a), and that status can be readily determined by available documents in virtually every case, Gov't Br. 24-25 n.16. Respondents do not contest the legal standard by which work authorization is determined or the accuracy with which it can be made.[1]

Since the district director's determination whether an alien is authorized to work (and thus whether the bond must contain a "no work" condition) is straightforward,

[1] Respondents do criticize the procedure by which the district director determines whether an alien has worked in violation of the bond condition. We address that concern in point 5, *infra*.

a formal adversarial hearing is not necessary. Nevertheless, respondents' remark that "no hearing" is available, Resp. Br. 1, suggests that administrative and judicial review is unavailable. That is not true. The district director must notify the alien that he may apply to an immigration judge for "modification of the conditions of release."[2] 8 C.F.R. 242.2(c)(2). The alien may apply either while he is being detained or after accepting the bond condition and being released, "within seven (7) days after the date of such release." 8 C.F.R. 242.2(d). In connection with his application, the alien has a right to appear through counsel and must be notified of free legal services programs. *Ibid.* The immigration judge must notify the parties of his decision "and the parties shall be promptly informed orally or in writing as the reasons for the Judge's decision."[3] *Ibid.* "The alien and the Service may appeal to the Board of Immigration Appeals from any such determination." *Ibid.*; 8 C.F.R. 3.1(b)(7). If the BIA upholds the imposition of the bond condition, the alien may seek relief in the United States District Court. 8 U.S.C. 1329.

The regulation thus requires the district director to impose a "no work" bond condition only after he determines, subject to administrative and judicial review, that an alien is not authorized to work. Thus, contrary to

[2] Immigration judges may conduct bond redetermination hearings by telephone. 12/6/83 Tr. 32. Immigration judges conducted 15,736 bond redetermination hearings in fiscal year 1990. Executive Office of Immigration Review, *Statistical Summary* n.p. (Nov. 1, 1990).

[3] If the alien does not receive the prompt decision required by regulation, he may file a petition for a writ of habeas corpus under 8 U.S.C. 1252(a)(1), which gives the district court "authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability" if "the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability."

respondents' contention, Br. 8, 19-20, the bond condition does not rest on a presumption of deportability. It rests on a determination—entirely separate from the determination of deportability—that an alien is not authorized to work. See 8 C.F.R. 242.2(d) (an application to remove a bond condition "shall be separate and apart from any deportation hearing or proceeding under this part, and shall form no part of such hearing or proceeding"); cf. *Bell* v. *Wolfish*, 441 U.S. 520, 533 (1979) ("The presumption of innocence * * * has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.").

As this case comes to the Court—on a facial challenge to the regulation—it must be assumed that the determination whether the alien is authorized to work can be made reliably and reviewed promptly. Cf. *United States* v. *Salerno*, 481 U.S. 739, 751 (1987).[4] The only question properly before the Court is whether the Attorney General has authority to impose a condition barring unauthorized employment pending determination of deportability.

2. Section 1252(a)(1) of the Immigration and Nationality Act of 1952 authorizes the Attorney General, pending final determination of deportability, to release an alien on bond "containing such conditions as the Attorney General may prescribe." 8 U.S.C. 1252(a)(1). The clause describing the permissible conditions—"as the Attorney General may prescribe"—contains no qualifying language that might restrict permissible conditions to those serving some immigration policies but not others. To the contrary, Section 1103(a) of the Act, enacted contemporaneously with Section 1252(a)(1), provides that "[t]he Attorney General * * * shall establish * * *

[4] Respondents' contrary assumption rests on the testimony of two immigration lawyers at the preliminary injunction hearing. Resp. Br. 42. Their testimony formed no part of the district court's decision to enter the injunction. That decision was instead based on the court's *sua sponte* grant of summary judgment on facial, statutory grounds. Pet. App. 82a-83a.

such forms of bond * * * as he deems necessary *for carrying out his authority under the provisions of this chapter.*" 8 U.S.C. 1103(a) (emphasis added). "[T]his chapter" refers to "Chapter 12—Immigration and Nationality," which includes the entire Immigration and Nationality Act. Respondents nonetheless insist that the Attorney General's authority is limited to ensuring "availability for hearings, the national security or public safety." Resp. Br. 7. In the face of this broad grant of bond-setting authority, however, respondents must find some unmistakable indication of such an intent in order to justify the lower court's injunction. None exists.

a. The Immigration Act of 1917, 8 U.S.C. 156 (1946), permitted release on bond "conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." As respondents point out, "[t]he statute was clearly concerned with appearance for proceedings." Resp. Br. 22; see *id.* at 9. But Congress amended the 1917 Act in 1950 precisely because it wanted to "change[]" this provision. H.R. Rep. No. 3112, 81st Cong., 2d Sess. 59 (1950). Accordingly, Section 23 of the Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 1011, provided that the availability of the alien for hearings shall be only one, or "among," the conditions of any release bond. App., *infra*, 11a. Congress "follow[ed] the procedure established by section 23 of the Subversive Activities Control Act of 1950" when it passed Section 1252(a)(1) of the Immigration and Nationality Act in 1952. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 29 (1952).

Congress's expansion of permissible bond conditions beyond those related to appearance was sensible; otherwise, the Attorney General would be forced to release aliens who present a danger to public safety if he were confident they would appear for hearings. Cf. *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) (upholding preventive

detention because "[o]therwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings"). Even respondents recognize the authority to impose bond conditions to protect the "public safety." Resp. Br. 7, 12. And the court of appeals likewise rejected the argument that bond conditions "must have the *sole* purpose of ensuring appearance at deportation hearings." Pet. App. 22a-23a. Once respondents concede the authority to impose bond conditions for purposes of the "public safety," there is no textual basis in the clause "containing such conditions as the Attorney General may prescribe," 8 U.S.C. 1252(a)(1), to limit permissible release conditions to any particular subset of the policies of the immigration laws.

b. Respondents contend that the Attorney General may prescribe bond conditions to further only some immigration policies because H.R. 10—the progenitor of Section 1252(a)(1)—would have authorized detention only for a particular purpose. Resp. Br. 9-10, 22-25.

This Court noted in *Carlson* v. *Landon*, 342 U.S. at 538-539, that H.R. 10 was the progenitor of Section 23 of the Subversive Activities Control Act of 1950, and thus of Section 1252(a)(1) of the Immigration and Nationality Act of 1952. See 96 Cong. Rec. 16,602 (1950) (indefinitely postponing consideration of H.R. 10 because "[i]t is part of a measure which already has been passed"). Congress's intention regarding the Attorney General's authority under H.R. 10 is therefore highly suggestive of his authority under Section 1252(a)(1).

Relying on floor statements, respondents assert that H.R. 10 would have authorized detention only of aliens subject to a final order of deportation and then only "in aid of deportation." Resp. Br. 9-10, 22-25. The floor statements on which respondents rely, however, related to the Attorney General's authority to detain criminal and subversive aliens without bond under subsection (c) of H.R. 10, not to his authority to impose bond conditions under subsection (a). See 96 Cong. Rec. 10,449-10,460 (1950); see also App., *infra*, 1a-8a (reprinting

H.R. 10).[5] Subsection (c) would have authorized the Attorney General to detain indefinitely any criminal or subversive alien "pending eventual deportation." App., *infra*, 6a. The bill's sponsors thought that aliens subject to deportation would have a greater incentive to help arrange their departure if they faced indefinite detention (rather than release into society, as was the case under the law at that time). 96 Cong Rec. 10,453 (1950) (remarks of Rep. Keating). Given the wording of subsection (c) and the particular purpose it was designed to serve, it is no revelation that Congress intended it to apply only to certain deportable aliens and then only to facilitate their deportation. At the same time, the limited scope and purpose of the proposed indefinite detention authority under subsection (c) says nothing about the intended scope and purpose of bond conditions under subsection (a).

The only explanation of the authority to set bond conditions under subsection (a) appears in the committee reports. Both reports state: "The bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit to include." S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950); H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949). "The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien."[6] *Ibid.*; see Gov't Br. 19-20. The legislative history of H.R. 10 provides no basis for limiting the purposes of bond conditions under 8 U.S.C. 1252(a)(1).

[5] See, *e.g.*, 96 Cong. Rec. 10,449 (remarks of Rep. Walter) ("[T]he detention provisions of this bill apply only to those cases where deportation orders have been issued for the deportation of prostitutes and procurers, of dealers in narcotics, of those criminals who have served over a year and a day in the penitentiary, and subversives."); *id.* at 10,456 (remarks of Rep. Hobbs). Representative Celler noted that "[t]he authors of this bill seek to avoid the taint or charge of imprisonment without trial by saying that the detention shall not be at hard labor." *Id.* at 10,450. That reference, like the rest of the floor debate, can only refer to subsection (c) of H.R. 10, which would have authorized detention, "though not at hard labor, pending eventual deportation." App., *infra*, 6a.

c. Respondents contend that Section 23 of the Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 1011, limited bond conditions to those ensuring appearance for hearings and protecting the public. Resp. Br. 26-27. The text of Section 23 does not bear that construction.

Section 23 required, as a mandatory condition of bond, that the alien "shall be produced" for hearings. App., *infra*, 11a. But it also provided that that condition was only one, or "among," the conditions of any release bond. *Ibid.* As explained in point 2.a., *supra*, Congress enacted Section 23 specifically to "change[]" the 1917 Immigration Act, which did limit bond conditions to those related to ensuring appearance. In addition, the legislative history makes clear that Section 23 "incorporate[d] the principal provisions of H.R. 10." S. Rep. No. 2369, 81st Cong., 2d Sess. 14 (1950). As demonstrated in point 2.b., *supra*, H.R. 10 would have given the Attorney General "full discretion" and "untrammeled authority" to impose conditions in addition to a condition that the alien be produced for deportation proceedings.

If bond conditions extend beyond those related to ensuring appearance—and respondents concede that this Court in *Carlson* v. *Landon*, 342 U.S. at 544, construed Section 23 to authorize "conditions of bond relating to the national security," Resp. Br. 27—nothing in the text

[6] This Court said in *Carlson* v. *Landon*, 342 U.S. at 543, that "the Attorney General is not left with untrammeled discretion as to bail." The "untrammeled discretion" that this Court rejected was the notion that "the Attorney General is left without standards to determine when to admit to bail and when to detain" alien communists—an alleged unconstitutional delegation of legislative power. 342 U.S. at 542. Contrary to respondent's contention, Resp. Br. 13, 24, the Court in that passage was *not* referring to the committee reports on H.R. 10. Cf. 342 U.S. at 539 n.32.

of that Section prevents the Attorney General from imposing conditions furthering other policies of the immigration laws as well.[7]

d. Respondents contend that the Attorney General's authority under Section 1252(a)(1) to impose "such conditions as [he] may prescribe" is limited by comparison to the grants of authority in Sections 1252(c) and 1252(d). Resp. Br. 9, 20-21.

Contrary to respondents' premise, the authority to prescribe bond conditions in Section 1252(c), which concerns aliens subject to a final order of deportation, is identical to that in Section 1252(a)(1). Both authorize the Attorney General to release aliens on bond "containing such conditions as the Attorney General may prescribe." It is true that Section 1252(c) goes on to authorize release without bond "on such other condition as the Attorney General may prescribe." But here, too, the breadth of permissible condition—"as the Attorney General may prescribe"—is identically broad. Section 1252(c) provides no basis for reading Section 1252(a)(1) narrowly.

In contrast to the Attorney General's authority under Section 1252(a)(1) and 1252(c), his authority under 8 U.S.C. 1252(d) to supervise an alien who cannot be deported is properly limited to ensuring availability for departure. See *United States* v. *Witkovich*, 353 U.S. 194, 201 (1957). This Court placed a limiting construction on Section 1252(d) because such supervision can continue indefinitely and might deprive aliens of existing First Amendment rights. 353 U.S. at 201. Although respondents

[7] Respondents try to distinguish the alien communists whose detention this Court upheld in *Carlson*, 342 U.S. at 526-547, from other aliens on the ground the "Congress made Communists excludable and deportable." Resp. Br. 27. But aliens seeking to enter the United States in order to work without authorization were made similarly excludable, 8 U.S.C. 1182(a)(14), and deportable, 8 U.S.C. 1251(a)(1), by the Immigration and Nationality Act of 1952. Employment-related bond conditions are thus entirely consistent with Section 23 and this Court's decision in *Carlson*. See point 3, *infra*.

continue to cite *Witkovich*, Resp. Br. 13-14, they do not address the obvious differences between the two subsections, or the lack of language in Section 1252(a)(1) suggesting a limiting construction similar to the one placed by the Court on Section 1252(d). See Gov't Br. 17 & n.9.

e. As noted at the outset of this brief, respondents now concede, with specific reference to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, that "later enactments do not explain what Congress had in mind in 1952." Resp. Br. 29. Although respondents note, Resp. Br. 11, 32, that Congress declined in IRCA to impose sanctions on employees who work without authorization, they do not dispute that IRCA left intact the Attorney General's preexisting authority and that the employee sanctions Congress rejected differed from the detention that would result from violation of the "no work" bond condition—detention that is limited to the duration of deportation proceedings and occurs only if the alien violates the bond condition. See Gov't Br. 17-18 & n.11. The only significance of IRCA to this case is its demonstration of Congress's continued commitment to protecting American labor from competition with aliens who are not authorized to work in this country.

3. Respondents do not directly respond to our contention that the prevention of unauthorized employment is a core purpose of the Immigration and Nationality Act. See Gov't Br. 22-23. Instead, they suggest that a bond condition forbidding unauthorized employment is not consistent with immigration policy because an alien does not commit a crime by working without authorization and because certain statutory benefits are available despite prior unauthorized employment. Resp. Br. 8, 16-18.

a. It does not follow from respondents' observation, however, that Congress intended to condone unauthorized employment. That Congress did not impose every possible sanction to deter unauthorized employment does not mean that unauthorized employment is permissible. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984) (ex-

plaining that "[a] primary purpose in restricting immigration is to preserve jobs for American workers," even though "Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally").[8]

Respondents confuse means and ends. Rather than make it a crime for aliens to work without authorization, Congress barred the admission of such aliens in the first place. Thus, Congress ordered the exclusion of aliens seeking to enter this country to work without authorization, 8 U.S.C. 1182(a)(14), and ordered the deportation of such aliens who enter in violation of that condition, 8 U.S.C. 1251(a)(1).[9] As the notice promulga-

[8] Two examples will illustrate the point. Respondents contend that, for an alien to adjust his status under the amnesty provisions of IRCA, he must demonstrate a history of unauthorized employment. Resp. Br. 11, 17-18, 30. It is true that an applicant for legalization must demonstrate a history of employment to prove that he will not be a public charge, 8 U.S.C. 1255a(d)(2)(B)(iii), and since the alien was not authorized to work, the law effectively requires a history of unauthorized employment to qualify for amnesty. It is in the nature of an amnesty, however, that the conduct forgiven is unlawful. That Congress was willing to forgive past unauthorized employment does not indicate that it intended to condone such conduct in the future.

Respondents also contend that the bond regulation is inconsistent with IRCA because it fails to "grandfather" aliens who are exempt from employer sanctions. Resp. Br. 33. Congress applied the employer sanctions prospectively, to new hires, in order to "be the least disruptive to the American businessman and * * * minimize the possibility of employment discrimination." H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 56 (1986). That purpose does not reflect a congressional intention to "grandfather" alien employees already working illegally.

[9] Quoting a passage from a committee report, respondents suggest that 8 U.S.C. 1182(a)(14) was the only measure Congress permitted to prevent unauthorized employment. Resp. Br. 10, 28; see H.R. Rep. No. 1365, 82d Cong., 2d Sess 51 (1952) ("It is the opinion of the committee that this provision will adequately provide for the protection of American labor against an influx of aliens * * *."). The committee's opinion as to the efficacy of Section 1182(a)(14), however, presupposes its effective enforcement. Without a condition barring unauthorized employment pending determination of deportability, "the alien could simply continue his employment with impunity until a deportation hearing was scheduled and through the appeal process." 48 Fed. Reg. 51,142 (1983), Pet. App. 140a.

ing the regulation put it: "Such unauthorized employment is a continuing violation of the immigration laws" and contravenes "a basic purpose of the immigration laws"—"to protect against the displacement of workers in the United States." 48 Fed. Reg. 51,142-51,143 (1983), Pet. App. 139a-140a. The regulation promulgated by the Attorney General simply mirrors the exclusion in 8 U.S.C. 1182(a)(14): aliens may be released into the population at large only on the condition that they not work without authorization.

Congress's decision to reserve employment opportunities for American citizens and legal residents—by denying them to aliens not authorized to work—is a policy choice that governs regardless of the good purposes to which the fruits of such employment would be put. It applies even if employment is necessary to support the alien or his family in the United States.[10]

b. Respondents fault our citation of IRCA to show Congress's continued commitment to prevention of unauthorized employment, because Congress enacted IRCA after it passed the Immigration and Nationality Act of 1952, which authorized the Attorney General to prescribe bond conditions. Resp. Br. 21. As previously noted, the

[10] Or to pay his lawyer. Although an alien has a statutory right to counsel in deportation proceedings, that right is "at no expense to the Government." 8 U.S.C. 1362. Amici American Bar Association asserts that without employment to retain counsel, individuals might fail to press colorable claims to citizenship or political asylum. ABA Br. 5 n.2, 6, 19-20. That risk is mitigated by provisions that the regulation does not apply to "[i]ndividuals maintaining a colorable claim to U.S. Citizenship," Gov't Br. 25 n.16 (quoting INS Operating Instruction), or to aliens who have filed nonfrivolous asylum applications, 8 C.F.R. 274a.12(c)(8), Pet. App. 134a; 48 Fed. Reg. 51,143 (1983), Pet. App. 143a. Others may nevertheless seek discretionary work authorization or help from family, friends, or charity to pay their lawyer. Alternatively, they may request pro bono legal assistance.

premise of respondents' argument—that "post-1952 legislative statements * * * should be given little weight," Resp. Br. 21—disposes of a major portion of the analysis on which the court of appeals based its ruling. Pet. App. 37a-48a. At the same time, it does nothing to undercut our contention that unauthorized employment is contrary to the immigration laws.

IRCA was not the first immigration law to contain provisions intended to prevent unauthorized employment. The employment-related restrictions in 8 U.S.C. 1182(a)(14) and 1251(a)(1) were part of the 1952 Act. Nor should Congress's repeated reinforcement of those restrictions be ignored. Although IRCA did not narrow the scope of the Attorney General's authority under 8 U.S.C. 1252(a)(1) (*i.e.*, to prescribe bond conditions to further the policies of the immigration laws), it did make it clearer that one of those policies is the prevention of unauthorized employment. Since the Attorney General may prescribe bond conditions to further any of the policies of the immigration laws, any expansion of those policies by subsequent legislation would necessarily enlarge the purposes for which bond conditions may legitimately be imposed as well.[11]

4. Notwithstanding respondents' characterization of the Attorney General's position as "ludicrous," Resp. Br. 2 & n.1, 15 n.7, his interpretation of 8 U.S.C. 1252(a)(1) to authorize imposition of bond conditions against unauthorized employment is of long standing and merits substantial deference.

Respondents confuse the existence of statutory authority with its exercise. Although they are correct that the Attorney General did not frequently exercise his authority to impose a bond condition against unauthorized em-

[11] The submission of the International Human Rights Law Group —that persons have "the right to be free to seek and accept employment," Br. 7, under customary international law—is not presented in this case. In any event, such a right would impose a duty only on the alien's native country, not the United States. Amici does not identify *any* country allowing aliens to "seek and accept employment" regardless of their immigration status.

ployment before 1983, he has consistently maintained that he has such authority. *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 553-556 (A.G. 1974); see Gov't Br. 33-35. Respondents suggest that this interpretation is not long-standing because the Attorney General stated that a bond condition against unauthorized employment "would be appropriate only 'in some circumstances.'" Resp. Br. 15 (quoting *In re Toscano-Rivas*, 14 I. & N. Dec. at 553). In fact, the Attorney General said that such a condition could appropriately be imposed "in *at least* some circumstances." *In re Toscano-Rivas*, 14 I. & N. Dec. at 553 (emphasis added). The regulation reflects the Attorney General's conclusion that current circumstances make the bond condition an appropriate one today.[12]

5. Construing 8 U.S.C. 1252(a)(1) to authorize a bond condition against unauthorized employment raises no substantial question under the Fifth Amendment's Due Process Clause.

a. Respondents' due process claim is unfounded, but it could not support the lower courts' injunction even if it were correct. Respondents' constitutional challenge asserts that the agency's procedure is inadequate to ensure that the bond condition will be imposed only on aliens who are not authorized to work. In contrast, the permanent injunction rests on the conclusion that employment-related bond conditions exceed the Attorney Gen-

[12] Amici American Immigration Lawyers Association suggests that deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inappropriate because respondents challenge the Attorney General's regulation as being "ultra vires"—a challenge that is "fundamentally different from *Chevron*-type disagreements over the meaning of a substantive term." Br. 10. The proffered distinction is elusive if it exists at all. Any agency action challenged as being in violation of a statute can be characterized as "ultra vires." See *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment). In any event, the Court has frequently deferred to agencies' determination of matters that affect their own statutory jurisdiction. *Id.* at 381-382; *Dole* v. *United Steelworkers of America*, 110 S. Ct. 929, 944 (1990) (White, J., dissenting) (collecting cases).

eral's statutory authority regardless of how they are applied. As respondents recognize, the appropriate remedy for the absence of a pre-deprivation hearing is provision of a hearing, Resp. Br. 36, not invalidation of the regulation implementing the bond condition. Thus, even if respondents' due process claim were properly before the Court (and respondents concede that it is not, Resp. Br. 35 & n.21), and even if the Court were to accept that claim, the correct judgment would be to read the regulation together with the Due Process Clause and require the agency to provide such additional procedures as the Constitution might require.

b. The canon of statutory construction that presumes Congress intended to enact a constitutional statute is inapposite because the text of 8 U.S.C. 1252(a)(1) does not admit of a limiting construction that would exclude employment-related bond conditions. This Court has repeatedly warned that this interpretive canon is "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)); see *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964). Instead, it applies only when language is ambiguous and "a construction of the statute is *fairly possible* by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932) (emphasis added).

Section 1252(a)(1) authorizes "such conditions as the Attorney General may prescribe." As shown in point 2.a., *supra*, that language cannot fairly be read to limit permissible bond conditions to those related to the alien's appearance for hearings. Indeed, this Court rejected a closely-related argument in *Carlson* v. *Landon*, 342 U.S. at 538, 542, where it upheld the detention of alien communists on security grounds under the predecessor of Section 1252(a)(1). It dismissed as "not * * * of great significance" the "factor of probable availability for trial." *Id.* at 541 n.35. Respondents' constitutional claim cannot compel a narrow reading of 8 U.S.C. 1252(a)(1)

because there is no available construction that would avoid the constitutional question.

c. In any event, respondents' constitutional challenge is insubstantial. Respondents confuse two separate determinations made by the district director: (1) whether an alien is authorized to work (and thus whether the "no work" condition will be imposed in the alien's release bond); and (2) whether an alien has violated the "no work" condition. Respondents' constitutional arguments focus chiefly on the latter determination. Resp. Br. 36. In fact, there are fully adequate procedures available with respect to both.

The procedures governing the initial determination plainly satisfy the Due Process Clause. The alien has a liberty interest in accepting employment only if he has a status authorizing him to work. He has two levels of administrative review and three levels of judicial review to ensure the accuracy of that determination. 8 C.F.R. 3.1(b)(7) and 242.2(c)-(d); 8 U.S.C. 1329. The Immigration Judge may conduct bond hearings by telephone, and the regulation requires him to render his decision promptly. 8 C.F.R. 242.2(d); see point 1, *supra*. That directive is buttressed by a statutory right to habeas corpus relief if "the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." 8 U.S.C. 1252(a)(1). In light of the extensive administrative and judicial review already provided, and the fact that the decision is based on the alien's immigration status and readily-available documents, point 1, *supra*, the probable value of additional safeguards is nil. Additional safeguards such as formal predeprivation hearings, however, would impose an enormous fiscal and administrative burden since they would apply in more than 100,000 deportation proceedings each year.[13] The existing procedures are more than

[13] Immigration judges received 112,314 deportation cases in fiscal year 1990. Executive Office of Immigration Review, *Statistical Summary* n.p. (Nov. 1, 1990).

sufficient to survive respondents' facial challenge. Cf. *United States* v. *Salerno*, 481 U.S. at 751.[14]

The procedures by which the district director arrests and takes custody of an alien for working in violation of a bond condition also comply with the Due Process Clause. Although the alien has a liberty interest in remaining free of unnecessary restraint, the risk that he will be detained in error is small. The bond itself will say whether the alien may work, and the determination whether the alien is working does not seem an unusually difficult one to make. The district director does not have to make "a judgment call regarding the likely outcome of the person's pending deportation hearing." Resp. Br. 39.

Moreover, the district director's arrest warrant must be based on probable cause, *International Molders' & Allied Workers' Local Union No. 164* v. *Nelson*, 799 F.2d 547, 552 (9th Cir. 1986), and the alien may apply to an Immigration Judge "for release from custody," 8 C.F.R. 242.2(d), with the same prompt decision and rights to administrative and judicial review as are available in bond redetermination proceedings, *ibid.*; 8 C.F.R. 3.1(b)(7).[15] The alien may also challenge the district

[14] Respondents suggest that imposition of the "no work" condition is tantamount to detention because bondsmen will refuse to write bonds for aliens to whom the condition is applied. Resp. Br. 37 n.22, 39. Although respondents assert that this conclusion is established by "unrebutted evidence," *ibid.*, the affidavits of bail bondsmen to which they refer presuppose that violation of the bond condition will forfeit the bond. 12/16/83 Tr. 67. That is incorrect. "Where the 'no work' condition is violated, the appropriate response would be to take the alien into custody." 48 Fed. Reg. 51,142 (1983), Pet. App. 141a-142a.

[15] This Court has previously held that a post-detention probable cause hearing affords all the process that is due an arrestee in a criminal case. *Schall* v. *Martin*, 467 U.S. 253, 275 (1984); *Gerstein* v. *Pugh*, 420 U.S. 103, 125 (1975). Such detention does not constitute punishment for a past crime but, under this regulation, protection of society from "a continuing violation of the immigration laws." 48 Fed. Reg. 51,142 (1983), Pet. App. 139a; cf. *United States* v. *Salerno*, 481 U.S. at 747-748.

director's decision by filing a petition for a writ of habeas corpus in United States District Court. 8 U.S.C. 1252(a)(1); see *United States ex rel. Yaris* v. *Esperdy*, 202 F.2d 109, 112 (2d Cir. 1953) (bond revocation determination reviewable for abuse of discretion); see also *Rubinstein* v. *Brownell*, 206 F.2d 449, 453-454 n.14 (D.C. Cir. 1953) (following *Esperdy*); *Bartholomeu* v. *District Director, Immigration & Naturalization Service*, 487 F. Supp. 315, 321 (D. Md. 1980) (same). Since the district director's bond revocation determination is not complicated, and is subject to administrative and judicial review, the Constitution requires no additional safeguards. See *Abel* v. *United States*, 362 U.S. 217, 234 (1960) (intimating that INS arrest procedure is constitutional based on the "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation") (dictum).[16]

* * * * *

Respondents' quarrel is not with the process by which bond conditions are imposed, but with the substantive policy it enforces: that aliens may not work without au-

[16] Respondents' challenge to the procedure by which the district director determines that an alien has violated a "no work" bond condition is not properly before this Court. Respondents do not deny that aliens subject to the regulation can comply with the bond condition by refraining from working without authorization. Their procedural challenge therefore rests on the speculation that individual respondents will violate the bond condition. This Court has consistently denied Article III standing to plaintiffs who sought injunctive relief based on the assumption that "they anticipate violating lawful criminal statutes and being tried for their offenses." *O'Shea* v. *Littleton*, 414 U.S. 488, 496 (1974). "It was to be assumed that '[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983) (quoting *O'Shea* v. *Littleton*, 414 U.S. at 497). Respondents' constitutional challenge therefore presents no concrete case or controversy as required by Article III.

thorization. The policy choice between preserving scarce job opportunities for Americans and opening the labor market to others is admittedly a difficult one. But Congress has resolved it in favor of protecting domestic laborers. Those authorized to work in this country need those jobs as much as respondents do—and are legally entitled to them.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

APPENDIX

1. H.R. 10, as debated and passed by the House of Representatives on July 17, 1950 (96 Cong. Rec. 10,448-10,449), provided: That section 20 of the Immigration Act of February 5, 1917, as amended (39 Stat. 890; 57 Stat. 553; 8 U.S.C. 156), is hereby amended to read as follows:

> Section 20. (a) That the deportation of aliens provided for in this act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States; or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States; or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such an alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its ter-

ritory. If the United States is at war and the deportation, in accordance with the preceding provisions of this section, of any alien who is deportable under any law of the United States, shall be found by the Attorney General to be impracticable or inconvenient because of enemy occupation of the country whence such alien came or wherein is located the foreign port at which he embarked for the United States or because of other reasons connected with the war, such alien may, at the option of the Attorney General, be deported (1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country wherein is located that government in exile, if that country will permit him to enter its territory; or (2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then, to a country or any political or territorial subdivision thereof which is approximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country. If deportation proceedings are instituted at any time within 5 years after the entry of the alien, such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this act, and the deportation from such port shall be at the expense of the owner or owners of such

vessels or transportation lines by which such aliens respectively came, or, if that is not practicable, at the expense of the appropriation for the enforcement of this act. If deportation proceedings are instituted later than 5 years after the entry of the alien, or, if the deportation is made by reason of causes arising subsequent to entry, the cost thereof shall be payable from the appropriation for the enforcement of this act. A failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this act shall be punished by the imposition of the penalties prescribed in section 18 of this act: *Provided*, That when in the opinion of the Attorney General the mental or physical condition of such alien is such as to require personal care and attendance, the said Attorney General shall when necessary employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed. Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any

such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. When such an order of deportation has been made against any alien, the Attorney General shall have a period of 6 months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for surrender of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States has not been effected, within 6 months from the date of the order of deportation the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized hereinafter in this section.

(b) Any alien, against whom an order of deportation, heretofore or hereafter issued, has been outstanding for for [sic] than 6 months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Commissioner of Immigration and Naturalization, with the approval of the Attorney General. Such regulations shall require any alien subject to supervision (1) to appear from time

to time before an officer of the Immigration and Naturalization Service for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information whether or not related to the foregoing as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Commissioner of Immigration and Naturalization in his case. Any alien who is found by the Attorney General to have willfully failed to comply with such regulations, or to have willfully failed to appear or to give information or submit to medical or psychiatric examination if required, or to have knowingly given false information in relation to the requirements of such regulations, or to have knowingly violated a reasonable restriction imposed upon his conduct or activity, shall be thereafter detained in accordance with subsection (c) until such time as the Attorney General orders other disposition of the alien's case. Nothing in this subsection shall preclude the Attorney General at any time from directing removal of any alien of the classes described in subsection (c) from supervision under this subsection to detention as prescribed in subsection (c).

(c) Any alien who is deportable under (1) the Act of October 16, 1918, as amended (40 Stat. 1008, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596, 21 U.S.C. 171, 174-175);

the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U.S.C. 156a); (3) so much of section 19 of the Immigration Act of 1917, as amended (30 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, may, in the discretion of the Attorney General, be denied the privilege of release as provided in subsection (a) and instead the alien may be taken into custody and transported to such place of detention as may be designated by the Attorney General and there, or at any such other place or places as may thereafter be designated by the Attorney General, be detained, though not at hard labor, pending eventual deportation, or until departure from the United States otherwise shall have been arranged, or until the Attorney General, upon sufficient evidence of good cause, shall order supervision of the alien under subsection (b)." [sic] In determining whether good cause has been shown to justify releasing the alien and ordering his supervision under subsection (b), the Attorney General shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inabilitly [sic] of

the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(d) Any alien subject to detention under subsections (b) or (c) of this section may be released, in the discretion of the Attorney General, from detention under subsection (c) and placed under supervision under subsection (b), on a showing which shall satisfy the Attorney General that the alien has obtained a travel document or made other approved arrangements to leave the United States, and, if considered necessary, upon giving a departure bond conditioned as prescribed by the Attorney General, with good and sufficient sureties approved by the Attorney General. Should any alien return to the United States after having departed pursuant to this subsection and be excluded and his deportation following such exclusion be impracticable, or if he enters the United States unlawfully, he shall again be taken into custody and, regardless of the charges upon which he was deportable, shall be thereafter subject to treatment in accordance wtih [sic] subsection (c). In any such case, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens required by this section to be taken into custody and detained. Nothing in this section shall be construed so as to prevent any alien detained under subsection (c) of this section, from questioning, on petition

for writ of habeas corpus filed in the district court of the United States of the district wherein he is detained, the validity of such detention.

(e) Before the Attorney General may order the release under supervision of any alien detained under subsection (c), he shall prepare and file with all the other papers relating to such case, a synopsis of the evidence upon which such order is to be made, and the reasons for such order.

(f) If any alien subject to supervision or detention under subsections (b) and (c) of this section is able to depart from the United States, except that he is financially unable to pay his passage, the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this act, unless such payment is otherwise provided for under this act.

(g) No court shall have jurisdiction to release on bond or otherwise any alien detained under any provision of law relating to the exclusion or expulsion of aliens at any time prior to a decision of court in his favor which is not subject to further judicial reviews.

2. Section 23 of the Subversive Activities Control Act of 1950, Title I of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1010-1012, amended Section 20 of the Immigration Act of February 5, 1917, as follows:

Sec. 20. (a) That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified

by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States; or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States; or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such an alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory. If the United States is at war and the deportation, in accordance with the preceding provisions of this section, of any alien who is deportable under any law of the United States, shall be found by the Attorney General to be impracticable or inconvenient because of enemy occupation of the country whence such alien came or wherein is located the foreign port at which he embarked for the United States or because of other reasons connected with the war, such alien may, at the option of the Attorney General, be deported (1) if such alien is a citizen or subject of a country whose recognized government

is in exile, to the country wherein is located that government in exile, if that country will permit him to enter its territory; or (2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then, to a country or any political or territorial subdivision thereof which is approximate to the country of which the alien is a citizen or subject, or with the consent of the country of which the alien is a citizen or subject, to any other country. No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution. If deportation proceedings are instituted at any time within five years after the entry of the alien, such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessels or transportation lines by which such aliens respectively came, or, if that is not practicable, at the expense of the appropriation for the enforcement of this Act. If deportation proceedings are instituted later than five years after the entry of the alien, or, if the deportation is made by reason of causes arising subsequent to entry, the cost thereof shall be payable from the appropriation for the enforcement of this Act. A failure or refusal on the part of the masters, agents,

owners, or consignees of vessels to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this act shall be punished by the imposition of the penalties prescribed in section 18 of this Act: *Provided*, That when in the opinion of the Attorney General the mental or physical condition of such alien is such as to require personal care and attendance, the said Attorney General shall when necessary employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed. Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. When such an order of deportation has been made against any alien, the Attorney General shall have a period

of six months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for surrender of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States has not been effected, within six months from the date of the order of deportation the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized hereinafter in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain.

(b) Any alien, against whom an order of deportation, heretofore or hereafter issued, has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall require any alien subject to supervision (1) to appear from time to time before an officer of the Immigration and Naturalization Service for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information whether or not related to the foregoing as the Attorney General may deem fit and

proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

(c) Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596, 21 U.S.C. 171-175); (3) the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U.S.C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his

departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(d) Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance.

(e) If any alien subject to this section is able to depart from the United States, except that he is financially unable to pay his passage, the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this Act, unless such payment is otherwise provided for under this Act.

3. Section 242(a) of the Immigration and Nationality Act of 1952, ch. 477, tit. II, 66 Stat. 208-209 (codified as amended at 8 U.S.C. 1252(a)(1)) provides:

> Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter au-

thorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1090

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The International Human Rights Law Group ("IHRLG") is a non-profit organization that seeks to promote the observance of international human rights. Founded in 1978, and incorporated in the District of Columbia, the IHRLG provides legal assistance and information in the field of international human rights law and has consultative status with the Economic and Social Council of the United Nations. In lawsuits raising questions of international human rights, the IHRLG provides legal assistance largely through attorneys working on a *pro bono* basis.

In this brief, the IHRLG addresses the issue of whether the right to be free of governmental prohibition against employment – a right violated by the "no-work" condition imposed by the INS regulations at issue – is a principle of customary international law incorporated into the federal law of the United States.

SUMMARY OF ARGUMENT

The right to work is a recognized norm of customary international law. It is embodied in the *Universal Declaration of Human Rights*, the *American Declaration of the Rights and Duties of Man*, the *European Social Charter*, and several other international agreements, conventions, and declarations. Over 150 nations have become parties to instruments that recognize the right to work.

Customary international law is part of the law of the United States. The Court is obligated to adjudicate questions of international law when they are duly presented to it.

The INS relies upon the Immigration and Nationality Act (INA) and the Immigration Reform and Control Act (IRCA) for the authority underlying its regulation imposing "no-work" conditions on alien appearance and delivery bonds. The INA and the IRCA, however, do not explicitly authorize no-work conditions. In keeping with traditional tenets of statutory construction, the Court must make every effort to interpret the INA and the IRCA so as not to conflict with norms of international law. The INS no-work condition violates the internationally recognized right to work by preventing detained aliens from seeking employment after they have been released on bond, leaving them in the dilemma of living without a job or returning to detention.

Therefore, to construe the statutes consistently with international law, the Court must affirm the court of appeals' decision that the statutes do not authorize the Attorney General to impose no-work conditions on alien appearance and delivery bonds.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW IS PART OF THE LAW OF THE UNITED STATES, AND, WHERE POSSIBLE, STATUTES MUST BE CONSTRUED CONSISTENTLY WITH IT.

International law is part of the law of the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900).[1] It has the status of federal common law.[2] Customary international law, or the "law of nations," was historically part of the law of England and thus part of the law of the American colonies.[3] Today, with United States independence, "[c]ustomary international law, like other federal law, is part of the 'law . . . of the United States.'"[4]

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[1] "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700. *See also The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("the Court is bound by the law of nations which is a part of the law of the land").

[2] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810-11 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). *But see* Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 870-78 (1987) (arguing that customary international law is superior to federal common law in that it is not superseded by subsequent legislation).

[3] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (hereinafter "RESTATEMENT"), Chapter Two Introductory Note, p. 40.

[4] RESTATEMENT § 111 and Comment e.

The Court has used principles of conventional and customary international law to inform American legal standards in a variety of situations. In striking down California's Alien Land Law, as applied, on constitutional grounds in *Oyama v. California*, 332 U.S. 633 (1948), four Justices joined opinions which cited the statute's inconsistency with the United Nations Charter as among the reasons for its invalidation. Justice Murphy noted that the law's "inconsistency with [Article 55 of] the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."[5] Similarly, the Court has used the *Universal Declaration of Human Rights* to give content to the due process clause, *Zemel v. Rusk*, 381 U.S. 1, 14 n.13 (1965) (upholding restrictions on travel to Cuba); to demonstrate the "drastic consequences of statelessness," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963) (holding unconstitutional statutes stripping citizenship of Americans remaining outside the country during time of war); and to support the upholding of a state "right-to-work" amendment, *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 549 n.5 (1949) (Frankfurter, J., concurring) (citing principle that "[n]o one may be compelled to belong to an association").

A. International Agreements Constitute And Contribute to Customary International Law.

Customary international law is ascertained from the "general usage and practice of nations."[6] *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). One source of that usage and practice is nations' own stated commitments, as embodied in international accords. International agreements constitute the

[5] *Id.* at 673 (Murphy, J. concurring). The statute forbade aliens ineligible for citizenship from acquiring, owning, occupying, leasing or transferring agricultural land.

[6] *See also The Paquete Habana*, 175 U.S. at 700 (international law found in "the customs and usages of civilized nations").

"practice of states" and contribute to customary international law.[7] For example, a multilateral agreement may become part of customary international law where it "is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states."[8]

As shown in Section II of this brief, the right to work is embodied in at least nine international accords. Each of these instruments was designed for adherence by states generally (or for states generally within a specific geographic region); each has been widely accepted; and, of the many reservations and exceptions registered by parties to these agreements, none has dealt with the right to work.

It is the role of courts to "ascertain[] and administer[]" international law "as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. at 700. Therefore, it lies within the Court's duty to determine those relevant principles that have achieved sufficient consensus among nations to be part of customary international law. *The Paquete Habana* illustrates the process. Searching legal history and the writings of jurists and commentators, the Court determined that a principle of common usage and practice among nations – the neutrality of coastal fishing vessels during war – had achieved the status of international law. More recently, the Second Circuit conducted a similar review in determining that the international consensus against the practice of torture has developed to the point that freedom from torture is now a right, the violation of which may be

[7] RESTATEMENT § 102, Comment i.

[8] *Id.*

remedied under the Alien Tort Statute. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).[9]

B. Where Possible, Statutes Must be Construed Consistently With Customary International Law.

It is a basic principle of statutory construction that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).[10] Recently the Court has reaffirmed the continuing validity of the rule in *The Charming Betsy* as a strong presumption against construing statutes in a way that would violate principles of international law. *Weinberger v. Rossi*, 456 U.S. 25 (1982) (stating it would require an "affirmative expression of congressional intent to abrogate the United States' international obligations").

II. THE RIGHT TO WORK IS A HUMAN RIGHTS NORM OF CUSTOMARY INTERNATIONAL LAW.

The right to work is recognized as a basic human right in international law. It is embodied in numerous international agreements and declarations, representing a consensus among

[9] The court in *Filartiga* found that the international prohibition against torture sustained a cause of action under the Alien Tort Statute for a foreign national living in the United States against an alleged tortfeasor. *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (norms of international law develop over time); *cert. denied*, 470 U.S. 1003 (1985).

[10] *See also Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations . . .."); *accord*, *MacLeod v. United States*, 229 U.S. 416, 434 (1913). This rule of construction is embodied in RESTATEMENT § 114: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."

the world's nations. The internationally recognized "right to work" necessarily includes, at a minimum, the right of freedom to work – that is, the right to be free to seek and accept employment.

A. What the Right to Work Means in This Case

The right to work at issue in this case is not the right to a job, but rather the right to be free to seek and accept a job. It includes the right not to be prohibited by the government from obtaining employment. The INS regulation would violate that right by prohibiting aliens released on bond from working, absent special authorization. Article 23(1) of the *Universal Declaration of Human Rights* states: "Everyone has the right to work, to free choice of employment . . .."[11] The United States, which took a leading role in the promulgation of the human rights provisions under the United Nations Charter, explained its understanding of the right to work in a 1948 address to the United Nations Commission on Human Rights:

> In the opinion of the United States delegation, the right to work, in this Declaration, meant the right of the individual to benefit from conditions under which those who were able and willing to work should have the possibility of doing useful work . . .. The realization of those objectives meant more to individuals in the United States than any guarantee of full employment.[12]

[11] *Adopted* Dec. 10, 1948, G.A. Res. 217A(III), 3 U.N. GAOR (Resolutions Part 1) at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L. L. SUPP. 127 (1949). Forty-eight nations signed the Declaration.

[12] Remarks of Mrs. Eleanor Roosevelt, addressing the United Nations Commission on Human Rights, Commission on Human Rights, 3rd Session, U.N. Doc. E/CN.4/SR 64, p. 6.

The freedom to work represents a basic economic right. For the individual, it serves as the foundation for the exercise of other political and civil liberties in a modern society.[13]

B. The Right to Work is Protected Through the United Nations Charter and Embodied in Numerous International Agreements.

Articles 55 and 56 of the Charter of the United Nations, to which the United States is a party, state that "Members pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55," and that among these are "universal respect for, and observance of, human rights and fundamental freedoms."[14] The *Universal Declaration of Human Rights*, which the United States and 47 other nations joined in proclaiming in 1948, gives definition to Articles 55 and 56 of the Charter by identifying more precisely what the members of the United Nations consider those "human rights and fundamental freedoms" to be.[15] The *Universal*

[13] The right of freedom to work is a right "of the very essence . . . of personal freedom and opportunity." *Truax v. Raich*, 239 U.S. 33, 41 (1915). Justice Bradley referred to an analogous right as the "liberty of pursuit -- the right to follow any of the ordinary callings of life," a right he deemed "inalienable." *Butcher's Union Co. v. Crescent City Co.*, 111 U.S. 746, 762, 764 (1884) (Bradley, J., concurring).

[14] Although the commitment embodied in Article 55 of the Charter is phrased in the nature of a pledge, it has been pointed out that "the obligatory nature of the human rights clauses is today outside the realm of serious controversy." Schlüter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 110, 126 (1973).

[15] The *Universal Declaration* is now considered by many as holding the authority of customary international law. "U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter." *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980). *See also* RESTATEMENT § 103, Comment e (stating that a declaration of an international organization provides evidence of what states voting for it regard the law to be; such resolutions "if not contradicted and if adopted by

Declaration identifies the "right to work, to free choice of employment" as among those rights and freedoms.

The mandates of Articles 55 and 56 of the Charter were further clarified in 1966 with the adoption of the *International Covenant on Economic, Social and Cultural Rights*.[16] Article Six of the *Covenant* states that the parties "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts," and that the parties "will take the appropriate steps to safeguard this right." As a member of the United Nations and a signatory to the *Covenant*, the United States should take the appropriate steps to safeguard the right to work. The Court, as a co-equal branch of government, has as great an obligation to "take the appropriate steps" as does either the executive or the legislative branch.[17]

Further evidence of the international consensus on the right to work as a fundamental norm of international law is found in several other agreements and declarations that have been entered into since the signing of the United Nations Charter. The *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 5(e)(i), states that "[p]arties undertake to guarantee the right of everyone . . . to equality of

consensus or virtual unanimity, are given substantial weight" as evidence of international law). The *Universal Declaration of Human Rights* was adopted by a 48-0 vote in the General Assembly, with eight members abstaining.

[16] *Adopted* Dec. 16, 1966, *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3. 93 nations have adopted the *Covenant*. The United States is a signatory, but has not yet ratified the *Covenant*.

[17] *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that courts must ascertain and administer international law). *See also* Schlüter, *supra* note 14, at 134: "Nothing in the nature of the international human rights obligations requires their execution exclusively by political organs . . . . On the contrary, the effective protection of human rights may be regarded as one of the traditional prerogatives of the national judiciary."

law in the enjoyment of . . . the right to work, to free choice of employment."[18] Likewise, the *Convention on the Elimination of All Forms of Discrimination Against Women*, Article 11(a), provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women . . . the right to work as an inalienable right of all human beings."[19] The United States has signed, although not ratified, these two conventions.[20]

Regional international pacts also evince the universal recognition of the right to work. The *American Declaration of the Rights and Duties of Man*, Article 14, declares that "[e]very person has the right to work."[21] Similarly, the *Protocol of Amendment to the Charter of the O.A.S. (Protocol of Buenos Aires)*, to which the United States is a party, states in Article 43

[18] *Adopted* Dec. 21, 1965, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195. To date, 129 nations have become parties.

[19] *Adopted* Dec. 18, 1979, *entered into force* Sept. 3, 1981, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/36 (1980), *reprinted in* 19 I.L.M. 33 (1980). To date, 95 nations have become parties.

[20] Under the terms of the widely-accepted Vienna Convention on the Law of Treaties (to which, however, the United States is not a signatory), these facts alone would oblige the United States to recognize the right to work pending its possible ratification of the Conventions. The Vienna Convention provides that, after a state signs a treaty, but before it ratifies the treaty (or makes clear its intention not to do so), the "State is obliged to refrain from acts which would defeat the object and purpose of [the] treaty." Article 18, Vienna Convention on the Law of Treaties, *concluded* May 23, 1969, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

[21] *Signed* May 2, 1948, O.A.S. Off. Rec. OEA/Ser.L/V/II. 23/Doc. 21/Rev. 6 (English 1979), *reprinted in* 43 AM. J. INT'L L. SUPP. 133 (1949). 21 nations, including the United States, joined in adopting the *Declaration*.

that "[w]ork is a right and a social duty."[22] The *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, Article 6(1), declares that "[e]veryone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity."[23] Likewise, the *European Social Charter*, Part II, Article 1(2), states: "With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake . . . to protect effectively the right of the worker to earn his living in an occupation \freely entered upon."[24] Similar expression of the right is found in the *African [Banjul] Charter on Human and People's Rights*, Article 15, which states: "Every individual shall have the right to work under equitable and satisfactory conditions . . ."[25]

Through these instruments, protecting the right to work has become the stated commitment of more than 150 nations. Such protection is now part of the "general usage and practice of nations," from which customary international law is ascertained. As an element of customary international law, it has become part of the law of the United States. Recognition of the right to work in this case requires the Court to interpret the statutes at issue consistently with the international consensus recognizing

[22] *Opened for signature* Feb. 27, 1967, *entered into force* Feb. 27, 1970, 21 U.S.T. 607, T.I.A.S. No. 6847, O.A.S.T.S. No. 1-A. To date, 31 nations have become parties.

[23] *Opened for signature* Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* 28 *I.L.M.* 161 (1989). To date, 14 nations have become parties.

[24] *Opened for signature* Oct. 18, 1961, *entered into force* Feb. 26, 1965, 529 U.N.T.S. 89, Europ. T.S. No. 35. To date, 16 nations have become parties.

[25] *Adopted* June 27, 1981, *entered into force* Oct. 21, 1986, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, (1981) *reprinted in* 21 *I.L.M.* 58 (1982). To date, 38 nations have become parties.

the right to work and thereby to uphold the court of appeals' decision.

C. The Right of Freedom to Work is Not Merely an Aspirational Principle, But a Human Rights Norm Capable of Immediate Realization.

Not all rights enumerated in international instruments are intended to create immediately enforceable norms of international law. Some declared "rights" are aspirational in tone; nations pledge to honor these rights to the best of their abilities, or to foster conditions that will make the exercise of the rights a practical reality. Examples of these rights are the right to an adequate standard of living and the right to social security.[26] Gradual implementation of these rights is the crux of the international obligation undertaken by states party to the relevant instruments. Accordingly, these rights may fall short of being considered binding norms of customary international law.

By contrast, the right of freedom to work does not represent a mere aspiration on the part of the world's nations; it can be achieved immediately. Protecting the right to work in this case means removing official obstacles to, and officially protecting, the freedom to seek and accept employment. Unlike some merely aspirational goals, it does not presuppose a particular level of national economic or social development. In the context of this case, the right to work represents a negative, not a positive, right; it simply requires that the United States refrain from barring aliens released on bond from obtaining employment.[27]

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[26] *See, for example, International Covenant on Economic, Social and Cultural Rights*, *supra* note 8, Article 9 (right to social security), Article 11 (right to adequate standard of living).

[27] *See* Wright, *National Courts and Human Rights -- The Fujii Case*, 45 AM. J. INT'L. L. 62, 72 (1951) (Article 56 of the United Nations Charter requires at a minimum that signatories *abstain* from action that would violate human rights and fundamental freedoms.)

D. The Right to Work is Not Foreign to American Law, But is Closely Related to the Constitutional Principle of Liberty to Choose an Occupation.

Although the right to work may be found in international accords, the concept of the right freely to choose and accept employment is also embedded in the constitutional fabric of American law, as a liberty interest protected by the Fifth and Fourteenth Amendments.[28] The Court declared early this century that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915) (striking down Arizona statute requiring all enterprises with more than five employees to hire 80 percent non-aliens).[29] Similarly, in overturning a schoolteacher's conviction for teaching the German language in violation of state law, the Court declared that "[w]ithout doubt, [the Fourteenth Amendment] denotes . . . the right of the individual . . . to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).[30] Even earlier, the Court recognized the deprivation of liberty that

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[28] Consequently, recognition of that right does not impose "the views of other nations" on Americans. *See Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1989) (Scalia, J., dissenting).

[29] Indeed, by barring aliens from working at all, the INS no-work condition is even more restrictive of an alien's right to seek employment than the Arizona statute declared unconstitutional in *Truax v. Raich*.

[30] *See also Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (stating that civil service regulation which resulted in "ineligibility for employment in a major sector of the economy" for noncitizens was "of sufficient significance to be characterized as a deprivation of an interest in liberty").

occurs when a person is barred from access to his livelihood. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (overturning conviction under discriminatory scheme for regulating laundries).

So, while United States law has never recognized a general constitutional right to a particular job,[31] it has strongly supported the idea that denial of the right to work at all, or restriction of that right to so narrow a sphere that it has no practical meaning, is a serious infringement of an important fundamental freedom. Thus, the United States has demonstrated in its own constitutional law a "practice" of protecting the right to work that contributes to the universal practice supporting protection of that right in international law.

Viewed in this context, freedom to work, as embodied in customary international law, is familiar to, and entirely compatible with, United States law. The nations of the world, through multilateral international agreements, have recognized and codified this freedom and established it as a standard of international law.

III. THE IMMIGRATION STATUTES MUST BE CONSTRUED TO PROHIBIT ALIEN BOND "NO-WORK" CONDITIONS WHERE THOSE CONDITIONS ARE INCONSISTENT WITH THE RIGHT TO WORK.

The INS "no-work" condition on alien appearance and delivery bonds would deny the right to work to persons who are awaiting adjudication of their residence status by barring them from any form of employment. After release on bond, the alien awaiting deportation hearings would face the stark dilemma of trying to live during the interim without an income, or returning to detention. The coercive nature of this choice perverts the

[31] *Long Grove Country Club Estates v. Village of Long Grove*, 693 F. Supp. 640, 662 (N.D. Ill. 1988).

very purpose of a bond – which is premised on the idea that the person released is legally entitled to remain in the country until adjudicated otherwise – by tying the bond to the denial of a basic freedom.

Neither the Immigration and Nationality Act nor the Immigration Reform and Control Act conflicts on its face with the right to work. The conflict arises only with the *interpretation* given the Acts by the INS. The INS relies on these two statutes to support its authority to impose "no-work" conditions on alien bonds. Petitioner's Brief at 13, 19. However, neither statute offers such support. Of the two statutes, only the Immigration and Nationality Act discusses the Attorney General's discretion in issuing alien bonds. The Act does not affirmatively express a Congressional intent to authorize the Attorney General to deny a person's right to seek employment. The relevant section states only that a bond may contain "such conditions as the Attorney General may prescribe." 8 U.S.C. § 1252(a)(1). The language of the Act certainly does not evince a clear statement that Congress intended the Attorney General's authority to supersede existing standards of international law. In the absence of such manifest intent, therefore, the Court must conclude that Congress intended the exercise of the Attorney General's authority to be consistent with international law, including the internationally recognized right to work. Accordingly, under the principle established in *The Charming Betsy*, the Court must construe the Act as not authorizing the Attorney General to include "no-work" conditions in alien appearance and delivery bonds.

Nor can it be maintained that the INS "no-work" regulation itself represents a controlling executive act that supersedes the right to work as a statement of United States law. In a similar situation, the Court has invoked the rule of *The Charming Betsy* to overrule an executive decision by the National Labor Relations Board where that decision was inconsistent with international law. *McCulloch v. Sociedad Nacional de Marineros*

de Honduras, 372 U.S. 10 (1963) (overruling NLRB decision that it could regulate foreign flag ships). Likewise, in *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), the court referred to international law principles in holding that, despite the Attorney General's broad discretion in the area of immigration, the INS could not hold a refugee in indefinite detention. The court noted that "[i]t seems proper then to consider international law principles for notions of fairness as to [the] propriety of holding aliens in detention." *Id.* at 1388. Again, in *Coriolan v. I.N.S.*, 559 F.2d 993 (5th Cir. 1977), the court ordered reconsideration of an INS deportation order, noting that "[t]he sweep of [the Attorney General's] discretion, however, must now be measured in light of the United Nations Protocol Relating to the Status of Refugees." *Id.* at 996. Similarly, in this case, the sweep of the Attorney General's discretion in issuing conditions on alien appearance and delivery bonds must be measured in light of the international agreements embodying the right to work. In that light, the no-work condition cannot stand.

CONCLUSION

For the foregoing reasons, the International Human Rights Law Group respectfully urges the Court to affirm the decision of the court of appeals.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. Its more than 360,000 members come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges on the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in related fields.

The ABA has a long-standing interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration laws. Consistent with these principles, and to help implement them, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law in 1983, comprised of representatives of nine ABA entities with specialized expertise (*e.g.*, administrative law). The ABA has a particular interest in the right of persons in immigration proceedings to have access to counsel. In 1983, the ABA House of Delegates approved a Resolution which expressed the ABA's opposition to "legislative proposals relating to immigration and naturalization that would limit the rights of persons subject to exclusion, deportation or asylum proceedings to retain counsel and to enjoy full representation."

Because of the overwhelming need for counsel to assist aliens facing deportation, the Coordinating Committee has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel aliens and represent them in deportation and other proceedings before the Immigration and Naturalization Service ("INS" or "Immigration Service"). Most recently, in November 1990, the ABA undertook an intensive Immigration *Pro Bono* Development project to further develop *pro bono* and low cost legal services for persons in immigration proceedings. This project has led delegations to INS detention centers in Texas and Florida to assess representation needs and develop solutions.

The ABA has an active and direct interest in the efficient and equitable administration of justice. The ABA appears as *amicus curiae* in this case because the question presented has serious implications for the access of immigration law applicants to legal representation.

The ABA has received the consents of all parties to this case to present its views.

SUMMARY OF ARGUMENT

1. The challenged regulation will force virtually every detained person without financial means but with a valid claim to immigrate or for relief from deportation to face adversarial administrative proceedings without the benefit of legal representation. The "no work" bond condition affects all detained individuals whether they ultimately would prevail in a well-presented claim or not. It directly affects those who lack the financial resources to support themselves and to retain counsel, even though they might ultimately prevail in the deportation case. Thus, the bond condition creates a "Catch 22": detainees must accept the bond condition and be at temporary liberty without counsel or financial means to support themselves, or they must remain in jail to be fed and clothed, largely guided by fellow detainees as advisors, until their immigration hearing is finally determined—often months, and sometimes even years later. Essentially the "no work" bond condition assumes that the detainee has no right to enter or to remain in this country. Yet this is precisely the determination which is to be made by the Immigration Judge in the deportation proceeding, and it is the issue which the alien needs the assistance of counsel to present. Neither option—release without employment or continued detention—presents any meaningful opportunity to obtain counsel. Each puts the respondent at a significant risk of prejudice in meeting the burden of proof and prevailing in deportation proceedings.

2. Indeed, assistance of counsel is a virtual necessity if aliens are to receive a full, fair and complete adjudication of their claims. The complexity of deportation proceedings, the intricacies of substantive immigration law, the clear burden of proof and risk of evidentiary insufficiency placed on the applicant in immigration hearings and the relative lack of legal sophistication of applicants combine to make access to counsel vitally important in these cases. Congress itself recognized the need for access

to legal representation in this context, and provided for it, without equivocation, in the Immigration and Nationality Act (hereinafter, "INA" or "the Act").

ARGUMENT

I. IF IMPLEMENTED, THE CHALLENGED REGULATION WILL RESULT IN MANY DETAINED PERSONS WITH VALID CLAIMS TO BE PRESENT AND REMAIN IN THE UNITED STATES BEING FORCED TO FACE IMMIGRATION PROCEEDINGS WITHOUT THE ASSISTANCE OF COUNSEL.

Individuals who are detained by the INS and issued an order to show cause why they should not be deported find themselves in a system that is fraught with obstacles to obtaining legal representation. *See infra* at pp. 9-11. The bond condition challenged in this case will add a new hurdle to the already difficult barriers to securing counsel which face a person in deportation proceedings.[1] Although the Immigration Service attempts to characterize the challenged regulation as merely prohibiting unauthorized employment, the issue is far more complicated. The true test of this regulation is whether it impairs the ability of persons with valid claims to be present in the United States to have those claims adjudicated with the assistance of counsel of their choice. The "no work" bond condition fails this test, frustrating the rights even of people the Immigration Service would concede have valid claims.

A. The Challenged Regulation Will Affect All Persons Detained By The INS Who Do Not Have Sufficient Resources To Sustain Themselves And Pay For Legal Representation Without Engaging In Employment.

The argument that the "no work" bond condition will affect only those people who have entered the country il-

[1] These existing barriers are pervasive and have been well documented by courts and commentators. *See infra* at pp. 9-11.

legally and are deportable, but who seek discretionary relief, Pet. Br. at 25, ignores the plain language of the challenged regulation.[2] The bond condition prohibits from working the large number of persons in deportation proceedings whose legal right to be and remain in the United States is the central issue to be decided.[3]

[2] At a minimum, the regulation will prohibit from working all persons detained by the INS who did not have authorization to work prior to the time they were detained. In fact, the regulation is more sweeping in its effect. The only persons who would escape the "no work" prohibition are those whom *the INS concedes* already have authorization to work incident to their status. Thus, a person who has been granted work authorization pursuant to one of the "discretionary" grounds, *e.g.*, having filed a non-frivolous application for political asylum, will be subject to the bond condition. This is because such "discretionary" grants of work authorization automatically terminate when a person is placed in detention. Although it is technically accurate to say that the termination provision does not prohibit any such person from applying for work authorization, Pet. Br. at 24 n.15, the INS accepts work authorization applications only from persons who are not in detention. 8 C.F.R. § 274a.12 (c)(13). Thus, detainees first must accept the "no work" bond condition before they can even apply for authorization to work.

Furthermore, it seems unlikely that the Service, on the heels of terminating an individual's authorization to work, would then proceed immediately to re-issue the authorization. Indeed, the very language in which the Government phrases its argument indicates that such persons likely will not be granted authorization to work. *See* Pet. Br. at 13 ("aliens in deportation proceedings who lack work authorization should not be permitted to seek employment while released on bond") and 23 ("Where an alien . . . is unable to establish . . . that he or she is authorized by law to work . . . there is good reason not to allow that person to take a job").

[3] This consideration is not insignificant. Persons arrested by the INS and placed into deportation proceedings often are entitled to be present and remain in the United States. *See, e.g., Local 512, Warehouse & Office Workers Union v. NLRB*, 795 F.2d 705, 721 (9th Cir. 1986); *C.M.K. v. Richardson, Attorney General*, 371 F. Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States"). Although the Immigration Service has now stated, without regulatory enactment or APA compliance, that the bond condition "normally" will not apply, for ex-

There can be no doubt that the challenged regulation will prohibit from working individuals who are legally entitled to work.[4] The argument that cases in which persons the INS decides to put into deportation proceedings will have colorable claims to remain in the United States which they would need the assistance of counsel to present will be "rare," only serves to highlight the predicament facing those who do have valid claims. The INS puts in deportation proceedings those whom its officers apprehend and decide will not be able to sustain their burden of proof of eligibility. Thus, the concepts are

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ample, to individuals maintaining a "colorable claim" to U.S. citizenship, Pet. Br. at 25 n.16, and that, in any event, such persons could apply for discretionary work authorization upon a showing that "there is a reasonable chance that legal status may ensue in the future," 8 C.F.R. § 274a.12(c)(13)(iii), relying on INS's view of what is a "colorable" claim is certainly cold comfort. For a person without ready documentation, and without counsel to help marshal and present the facts, demonstrating that a claim is "colorable" or likely to prevail is as difficult as proving the claim in the first place. If a colorable claim were so easy to establish, deportation presumably no longer would loom as a threat.

Moreover, the "solution" that all a person in this predicament needs to do is to apply for work authorization has little basis in reality. First, as the Ninth Circuit has construed the challenged regulation, the bond condition would prohibit all work—authorized or not—upon release from detention until the immigration hearing. Thus, application for discretionary work authorization would be to no avail. But even if one accepts the contention, not embodied in any statute or regulation, that the bond condition will not be enforced as a matter of practice or custom to prohibit authorized work, the INS's argument should be greeted with skepticism, for it has repeatedly failed to issue work authorization documents in conformance with its own regulations. In many instances, work authorization is not timely granted, or not granted at all until the applicant brings a mandamus action against the INS. *See, e.g., Ramos v. Thornburgh*, 732 F. Supp. 696 (E.D. Tex. 1989) (granting partial preliminary injunction against INS on claim that it wrongfully denied and failed to timely grant or deny work authorization).

[4] Indeed, the Government admits as much in its brief. Pet. Br. at 25 n.16.

used, in circular fashion, to deprive the alien of liberty and the best opportunity to make a case in proceedings. It comes as no surprise that the INS argues now that its officers' initial decisions about deportability are usually right. In many cases they become a self-fulfilling prophecy.

B. The Challenged Regulation Subjects Detainees To A "Catch 22."

Most respondents in deportation proceedings do not have adequate financial resources to obtain counsel, absent the opportunity to work. In part due to the highly technical nature of substantive immigration law, *see infra* at pp. 15-17, and in part due to the substantial numbers of people put into deportation proceedings each year,[5] the level of available free legal representation for such people is grossly inadequate.[6] The ABA has devoted sig-

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[5] Latest available public statistics show that in 1989, 118,906 deportation cases—of which 20,331 (about 17%) involved applicants for political asylum—were filed by the INS with the Executive Office for Immigration Review. Executive Office for Immigration Review, *Statistical Summary* (November 13, 1989).

[6] For example, in a study of the conditions of detention of undocumented aliens, a group of concerned organizations reported on their attempts to secure *pro bono* representation for persons detained at the INS's Oakdale, Louisiana, facility, the largest detention center operated by the INS:

> Efforts to recruit and train lawyers in New Orleans to assist at Oakdale were finding only a few willing and able to volunteer to provide the needed *pro bono* representation. Indeed, in response to a request sent to more than 600 lawyers in the area in 1984, only three indicated a willingness, with qualifications, to represent detainees on a *pro bono* basis.

American Civil Liberties Union, Church World Service, Lutheran Immigration & Refugee Service, National Council of La Raza, San Francisco Lawyers' Committee for Urban Affairs, *Detention of Undocumented Aliens* Part 1, 86 (October 1990) (hereinafter, "*Detention Study*"). At the time, the Oakdale facility housed over 700 detainees. Existing organizations which attempt to fill the desperate need for free legal assistance are taxed beyond their resources. *See*

nificant resources toward the development of a *pro bono* immigration bar, but these efforts do not meet the existing and the growing need.[7]

The harsh reality is that most individuals seeking to exercise their right to obtain counsel undoubtedly will have to pay for it. Thus, almost invariably, a person's only hope of obtaining counsel during the period of time between release from detention and the deportation hearing is to earn enough to meet those payments.

Persons arrested by the INS who are unable to pay for an attorney to help them present their claim are left to decipher the puzzle that is immigration law on their own. This task has proven arduous even for skilled and experienced immigration attorneys, as American immigration law is notoriously complex. To make matters worse, individuals in deportation proceedings typically are educationally disadvantaged. Many cannot speak English; some cannot even read or write in their native language. *See infra* at pp. 17-18.

Moreover, the bond condition has the greatest impact on those who have valid claims to relief. Such persons risk much to pursue the chance to have their claims

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ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum in South Texas*, 15 (July 1989) (hereinafter, "*ABA South Texas Report*").

[7] The paucity of free legal resources for persons in deportation proceedings is exacerbated by the fact that local legal services programs may use Legal Services Corporation funding to assist only certain designated categories of non-citizens. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 101-515, § 607, 104 Stat. 2101, 2148-53 (1990). Thus, the main resource to which indigent litigants turn for legal assistance is foreclosed to most persons in deportation proceedings. Furthermore, Equal Access to Justice Act ("EAJA") funds traditionally have not been available for deportation representation, although the issue is currently before this Court. *Ardestani v. United States Dep't of Justice, INS*, 904 F.2d 1505 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991).

adjudicated before an immigration judge. Although hundreds of thousands of people are apprehended by the INS each year, 90% leave the country willingly shortly thereafter when offered voluntary departure. Those who decline to depart the country must endure the hardships of detention or raise significant sums of money for bail, all for the opportunity to present their claims in immigration court. These claims—to U.S. citizenship, registry, suspension of deportation, political asylum, adjustment of status—are frequently complex and require detailed documentation and offers of proof. Thus, it is these people who most need the assistance of counsel. And yet it is these same people who will suffer most from the challenged bond regulation.

The statutory right to obtain counsel, *see infra* at pp. 14-15, which should operate to protect persons apprehended by the INS who have strong claims, is meaningless if they do not have a reasonable opportunity to exercise that right. *See Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (INS must give "more than lip service to the right to counsel"). Here, the no-work bond condition effectively will prevent nearly all persons facing deportation from exercising their right to counsel. Thus, individuals in detention are faced with an essentially meaningless choice as regards the right of access to legal representation: they must either stay in jail, or they must raise bail and accept a bond condition which prohibits employment and which, if violated, will result in forfeiture and re-incarceration.

As difficult as it is for an alien without funds to secure representation after being released from INS custody, persons against whom the "no work" bond condition is enforced face even greater obstacles to securing counsel and preparing their immigration defenses if they are returned to INS custody. Once in detention, an individual's access to legal counsel is completely regulated by the INS, and this access is "severely restricted." Helsinki Watch, *De-*

tained, Denied, Deported: Asylum Seekers in the United States 48 (June 1989). As documented in the *Orantes-Hernandez* case, 919 F.2d 548 (9th Cir. 1990), conditions of detention have included total or partial bans on writing materials, restrictions on telephone use, daily announcements of the availability of voluntary departure (without notifying detainees of other rights), limiting daytime visiting hours with attorneys, distributing inaccurate legal services lists, and placing detainees in solitary confinment without a hearing under the guise of administrative segregation. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).[8]

Moreover, the problem of securing representation is aggravated by the INS's practice of transferring large numbers of detained aliens to remote detention facilities where there is little, if any, free legal assistance available. *See* Note, *INS Transfer Policy: Interference With Detained Aliens' Due Process Right To Retain Counsel*, 100 Harv. L. Rev. 2001, 2005 (1987). The INS may place an individual in any detention center it likes, no matter how far away from family, friends, or available counsel. Many INS detention centers are in areas far from any concentration of legal services, free or otherwise, such as in Harlingen, Texas. *See* Lawyers Committee for Human Rights and Helsinki Watch, *Mother of Exiles* 69-70 (1986).[9] Although the INS is required to

[8] The court in *Orantes-Hernandez* upheld a permanent injunction which required the INS to notify detainees of their right to apply for political asylum and of their right to be represented by counsel. In upholding the injunction, the court found that the unacceptable conditions of detention which had been documented in proceedings below, and which impaired detainees' access to counsel, had not abated despite the lower court's entrance of a preliminary injunction imposing similar requirements.

[9] The INS operates seven detention centers which are capable of detaining 2,429 persons, contracts with private facilities for detention of another 950 persons, and has arrangements with over 900 state and local prisons and jails for additional space. Hearings

provide a list of free legal counsel to all detainees, 8 C.F.R. § 242.1(c), these lists are often inaccurate or out of date.[10]

Even when detainees have been able to overcome these initial barriers and actually secure representation, "[l]awyers have had trouble getting access to their clients." *Detention Study* at 87. *See also ABA South Texas Report* at 13 (legal representatives experience delays of several hours waiting for their clients to be escorted to the interview area, even when counsel provided the names of clients they wished to see in advance). The INS sets attorney visitation hours, controls telephone access to attorneys, and structures all visits by attorneys to the detention center.

Simply put, INS power over the conditions surrounding access by detainees to counsel is absolute,[11] and well-documented abuses of that power abound. Because it in-

on INS Management Issues: Hearings Before the Subcom. on Int'l Law, Immigration, and Refugees of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 9 (1991) (testimony of Arthur Helton).

[10] *See, e.g., Detention Study* at 86 ("lists of available legal services were often inaccurate or out of date"); *ABA South Texas Report* at 13; Amnesty International USA, *Reasonable Fear: Human Rights and United States Refugee Policy*, 15 (March 1990); Minnesota Lawyers International Human Rights Committee and Physicians For Human Rights, *Hidden From View: Human Rights Conditions in the Krome Detention Center*, 6 (April 1991) ("INS officials fail to adequately inform detainees about opportunities for pro bono legal representation and refuse to allow others to so notify detainees"); *Orantes-Hernandez*, 919 F.2d at 564-65 (upholding district court in finding that many legal services lists provided to detained aliens "did not contain accurate telephone numbers and . . . many of the offices were not located in the vicinity where the alien was being detained").

[11] *See* Gilboy, *Setting Bail in Deportation Cases: the Role of the Immigration Judges*, 24 San Diego L. Rev. 347, 398 (1987) ("the authority of immigration officials to set bail is an anomaly in law enforcement").

evitably results in the detention of indigent aliens, the "no work" bond condition will deny access to counsel to vast numbers of people who are legally present in this country and are simply awaiting a judicial declaration of that status but who are being treated from the outset as ineligible.

In light of the vital private interest of persons facing deportation and the clear, well-documented risk that, absent representation by counsel, a person entitled by law to remain in this country may be erroneously deprived of that right, courts have given careful scrutiny when reviewing INS regulations or practices that may impede acecss to counsel. As with all deportation procedures, "[m]eticulous care must be exercised lest the [deportation] procedure . . . not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

When INS procedures have unreasonably obstructed a person's right to retain counsel, such procedures have been struck down. For example, in *Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985), the court found that the immigration judge had violated an alien's right to retain counsel by not *sua sponte* granting further continuances until counsel could be retained. Indeed, when called upon to review the INS's deportation procedures, courts of appeals have often found it necessary to enjoin the INS from imposing or applying procedural rules that block a person's access to legal counsel. *See, e.g., Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1040 (5th Cir. 1982) (declaratory and injunctive relief granted where Haitians in Florida were not given a hearing on their asylum claims at a meaningful time and in a meaningful manner; the normal scheme for asylum processing contemplates full opportunity for the alien to present his case); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (Salvadoran respondents entitled to permanent injunction requiring INS to give them oral notice

of the right to counsel prior to any request to sign a voluntary departure form).[12]

II. ASSISTANCE OF COUNSEL IN IMMIGRATION PROCEEDINGS IS ABSOLUTELY VITAL TO INSURE A FULL AND FAIR ADJUDICATION OF A RESPONDENT'S CLAIM.

This Court already is familiar with the plight of persons who the INS has placed in deportation proceedings. They typically are undereducated, unfamiliar with the language in which they are being accused, and without the financial resources to obtain counsel to assist them in presenting their claims.[13] *See infra* at pp. 17-18. The

[12] Likewise, courts of appeal have been reluctant to find that a person has waived the right to retain counsel. *See, e.g., Montilla v. INS*, 926 F.2d 162, 170 (2d Cir. 1991); *Van Den Berg v. Lehmann*, 261 F.2d 828, 829 (6th Cir. 1958) (respondent in deportation proceeding did not understand, speak or read English, had never been represented by counsel of his own choice, and had no intelligent, reasonable opportunity to explain circumstances); *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979) (waiver of right to counsel "without being provided with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf" found invalid); *Rios-Berrios v. INS*, 776 F.2d at 863 ("The record demonstrates that the immigration judge proceeded instantly to take evidence, an action that would intimidate an alien appearing before him, particularly after the chilling warning that the hearing would proceed and that no further continuances would be granted. We will not hear the INS argue waiver on the facts of this record").

[13] *See, e.g.*, Gordon, *Right to Counsel in Immigration Proceedings*, 45 Minn. L. Rev. 875, 877 (1961) ("The persons involved in immigration proceedings usually are aliens, and generally they are in the less privileged economic class. Often they are at the threshold of our country, or have recently arrived, and they have little or no comprehension of our language or institutions."); Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 Harv. L. Rev. 2001, 2008 (1987) ("most aliens are unfamiliar with both the English language and the American judicial system and a lawyer is essential in presenting their claims").

substantive and procedural aspects of the laws under which such persons may be claiming relief from deportation or exclusion undoubtedly are some of the most intricate and complicated provisions of American law. Representing the Government on the other side of this adversarial proceeding is an INS trial attorney trained in the complexities of immigration law.

In recognition of the fundamental imbalance inherent in such a proceeding, and the substantial interest a respondent has in its outcome, Congress explicitly granted the right to counsel, at no expense to the Government, to all respondents in deportation or exclusion proceedings.[14] Titled "Right to Counsel," Section 292 of the Act mandates that

> [i]n any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362. Moreover, section 242 of the Act—the same section which authorizes the Attorney General to set conditions of bond for aliens released from detention—directs the Attorney General to adopt regulations governing deportation proceedings which "shall include" the requirement that "the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1252(b)(2). *See also Rios-Berrios v. INS*, 776 F.2d at 862. The legislative history of these provisions confirms that Congress intended to confer a *right*.[15]

Persons facing deportation or exclusion proceedings without the assistance of counsel may be utterly helpless to present their claims. Respondents in these proceedings are usually completely unfamiliar with the American legal system, and substantive immigration law is not simple. At least one commentator has ranked the INA "second only to the Internal Revenue Code in complexity." Hull, *Without Justice For All* 107 (1985). Likewise, the Fifth Circuit, after a lengthy opinion in which it attempted to unravel the intricacies of certain INS regulations, admonished the Service:

> In its brief the INS states "the public, of course, has a right to obtain guidance from the regulations for

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[14] Since deportation and exclusion proceedings are considered to be civil rather than criminal in nature, the Sixth Amendment affords no right to appointed counsel in such proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984). But "where the courts declined to see a constitutional remedy, Congress saw a dictate of humanity." *Castro-O'Ryan v. U.S. Dept. of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988). We do not address the constitutional argument here, because there is an adequate statutory basis for decision. We note, however, that courts have found that respondents in deportation proceedings *do* have a due process right to *access* to counsel. *See Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) ("the Due Process clause . . . affords an alien the right to counsel of his own choice at his own expense"); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) ("This court has held that aliens have a due process right to obtain counsel of their choice at their own expense"); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection").

[15] *See* H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 57, *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1712 ("Regulations promulgated by the Attorney General for the conduct of hearings *must* provide . . . that the alien *shall* have the *right* of being represented (at no expense to the Government) by counsel") (emphasis added). There is nothing in the legislative history to indicate that, by granting the Attorney General discretion to set bond conditions, Congress meant to vitiate—or to permit the Attorney General in any way to diminish—the right of persons in deportation or exclusion proceedings to obtain counsel. Yet the challenged regulation clearly frustrates the benefits intended to be conferred by the same statute.

> its dealings with the Service." We devoutly hope the INS and those who draft the regulations and Operations Instructions under which it operates will take this statement to heart. Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon. There is nothing esoteric about the subject matter. The regulations concern simple matters of great concern to human beings, most of them of limited education. They should be so written as to be comprehensible by intelligent laymen and unspecialized lawyers without the aid of both lexicon and inner-circle guide.

Dong Sik Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).[16]

Unfortunately, the Service has not yet heeded the Fifth Circuit's plea to make the regulations simpler and more intelligible. There can be no doubt that the substantive immigration law that may be applicable in deportation proceedings—the various types of lawful statutes, the requirements for citizenship and derivative citizenship, and the myriad grounds for expulsion—is extremely complicated. For example, the Act sets forth five general classes of offenses, including nineteen subcategories, which may result in deportation, and these general classes translate into hundreds of separate specific grounds when the language of the Act is fully parsed. 8 U.S.C. § 1251(a). The interpretation of these provisions has often proved difficult even for experts in immigration law. *See, e.g., Dong Sik Kwon*, 646 F.2d at 919.

[16] Critics of the almost perverse complexity of the Act and its associated regulations abound. As Chief Judge Kaufman of the Second Circuit noted, "[w]e have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges." *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). *See also* Address by J. Wasserman, 3 *Immigration and Naturalization Law Institute*, 309 (1970) ("Our Statute is the longest, the worst, the most ambiguous, the most complicated and illogical statute in the world").

Negotiation of this labyrinthian morass by an indigent person without the assistance of counsel is often impossible. This Court has recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Deportation and exclusion proceedings, especially those which involve the complicated inquiry necessary to determine an individual's legal status, are certainly such cases.

The procedural aspects of these proceedings can be equally daunting, further underscoring the need for meaningful access to representation. The burden of proof and insufficiency of evidence is on the alien in deportation proceedings. Individuals entitled to relief may be denied if they fail to present their evidence in a way that meets their burden of proof. In many ways, deportation and exclusion proceedings are as complex as any adversarial hearing, involving the opportunity to subpoena witnesses and documents, to take depositions, to conduct informal discovery, to elicit testimony by expert witnesses, and to conduct cross-examination of adverse witnesses. *See* 8 C.F.R. §§ 242.16(a), 292.5(b), 287.4, 236.2(d), 242.14(e). Clearly, without the assistance of counsel it is unlikely that persons arrested by the INS will be able to avail themselves of many of the procedural tools that might be useful in presenting their cases. In contrast, to effectively use these procedures, the government is represented by an INS trial attorney, a specialist trained in immigration law.

To compound the imbalance between the INS attorneys and unrepresented aliens, respondents in deportation proceedings are usually impoverished and are frequently un-

educated, unfamiliar with the American legal system and the English language, and often come from countries where the legal system is repressive and does not encourage people to insist on their claims. As this Court has noted, one finds in deportation proceedings "a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950). It would be difficult to imagine a group of people more ill-equipped to confront the complexities of immigration law and procedure than the majority of individuals in deportation and exclusion proceedings.

And yet, the risk of loss—of liberty, property, friends, and especially family—facing those in deportation proceedings is enormous. "Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties." *Lok v. INS*, 548 F.2d at 39.[17] As Justice Brandeis so eloquently put it, deportation "may . . . result in loss of both property and life; or all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Given the complexity of substantive immigration law and the enormity of procedural possibilities in deportation

[17] This Court has held that deportation proceedings are not criminal in nature, and thus are not subject to the constraints of the Sixth Amendment. *INS v. Lopez-Mendoza*, 468 U.S. at 1038-39. But it hardly can be contended that deportation is a typical civil proceeding either. To the contrary, as this Court has itself recognized, the consequences facing a potential deportee may be especially harsh. *See, e.g., Bridges v. Wixon*, 326 U.S. at 154 ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted"); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("[the individual's] interest [in deportation proceedings] is, without question, a weighty one").

proceedings, it is not surprising that persons who are represented by counsel in this process are more likely to prevail against the Government's effort to deport them. *See, e.g.*, Gordon, *Right to Counsel in Immigration Proceedings*, 45 Minn. L. Rev. 875 n.23 (1961); Black, *Due Process and Deportation—Is There A Right To Assigned Counsel?*, 8 U. Cal. Davis L. Rev. 289, 301-302 (1975). Sixty years ago a national commission on law enforcement reported the obvious: in "many cases" a lawyer acting for an alien would prevent a deportation "which would have been an injustice but which the alien herself would have been powerless to stop." Wickersham National Commission on Law Observance and Enforcement, "Report on the Enforcement of the Deportation Laws in the United States," in 5 *Report on the Cost of Crime* 109 (1931). Clearly, "[s]ince 1931 the law on deportation has not become simpler." *Castro-O'Ryan*, 847 F.2d at 1312. In light of these factors, courts have consistently emphasized the critical role of counsel in deportation proceedings, characterizing an alien's right to counsel of his choice as "fundamental."[18] Assistance of counsel is critical since "[t]he fate of an alien faced with imminent deportation often hinges upon narrow issues of statutory interpretation." *Lok v. INS*, 548 F.2d at 38.

Indeed, a General Accounting Office report shows that persons in deportation proceedings who request political asylum are more than three times as likely to prevail against the Government when they are represented by counsel as compared to unrepresented respondents. Government Accounting Office, *Asylum: Approval Rates for Selected Applicants*, Appendix Table 1.1 (GAO June 1987). In its report on detention conditions of asylum

[18] *Baires v. INS*, 856 F.2d 89, 91 n.2 (9th Cir. 1988). *See also Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *United States v. Saucedo-Velasquez*, 843 F.2d 832, 834-35 n.2 (5th Cir. 1988); *Cobourne v. INS*, 779 F.2d 1564, 1566 (11th Cir. 1986); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975).

seekers in south Texas, the ABA Coordinating Committee concluded that "the participation of counsel is a highly determinative factor in ensuring that bona fide applicants receive the full and fair asylum adjudications to which they are entitled." *ABA South Texas Report* at 3. Without access to legal counsel, persons arrested by the INS who have valid claims to be present and remain in the United States run a significant risk of being deported because they have failed to adequately present their claims.

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the decision of the Court of Appeals for the Ninth Circuit be upheld.

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IMMIGRATION & NATURALIZATION SERVICE, et al.
Petitioners,

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, et al.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

IMMIGRATION & NATURALIZATION SERVICE, et al.
Petitioners,

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, et al.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

STATEMENT OF INTERESTS

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has as its objectives, to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to

evaluate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration, nationality, and naturalization matters.

The membership of amicus practice regularly before the Immigration and Naturalization Service (hereinafter INS) in all of its districts nationwide, (hereinafter EOIR), and before the Board of Immigration Appeals; amici appear as well before the federal district courts and federal circuit courts of appeal of the United States, and have argued matters of immigration, nationality, and naturalization law before the Supreme Court of the United States.

AILA has a direct and serious interest in the development of the immigration law and in the case now before this Court. The issue upon which the court has granted *certiorari* directly involves the practice of immigration law and the interest of AILA's members. Whether qualifying aliens in deportation proceedings will be able to continue or seek employment during the pendency of deportation proceedings is of direct interests to AILA's membership and the clients of its members.

The familiarity of amicus with the nature of the proceedings involved, and the public interest at stake lead amicus to believe the court would benefit from the additional legal argument and interpretation with respect to the substantive question of law here at issue.

SUMMARY OF ARGUMENT

Deference to the INS interpretation of 8 U.S.C. § 1252(a)(1) is neither required nor appropriate under the circumstances of this case. The INS is not entitled to the deference required by *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* does not require deference to an agency assessment of its own authority. *Chevron* deference does not apply to an interpretative question where the issue concerns the scope of the agency's own authority.

Chevron deference is not warranted in the circumstances of this case. The statutory scheme is neither technical, nor complex. Moreover, the agency's position is a dramatic change from its past policy which entitles it to less deference.

Congress' intent with regard to the statute is in any event clear. The plain meaning of the statute only authorizes consideration of whether a bond will secure the alien's appearance at the deportation hearing or a determination as to whether he presents a security risk. Utilizing the traditional tools of statutory construction, Congress' intent is apparent.

Section 1252 considered within the context of the statute as a whole is clear and the regulation is not authorized. Finally, even if the statute were found to be ambiguous, the Attorney General's regulation is unreasonable and should be rejected.

ARGUMENT

I. DEFERENCE TO THE INS'S INTERPRETATION OF 8 U.S.C. SEC. 1252(a)(1) IS NEITHER REQUIRED NOR APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE

The principal issue before the Court is whether the Attorney General[1] may in the exercise of his discretion under 8 U.S.C. sec. 1252(a)(1) (1988) establish a blanket rule requiring the inclusion of "no work" conditions in the release bonds authorized by the statute. Both respondents and the Court of Appeals read sec. 1252(a)(1) to preclude such a blanket rule. Petitioners[2] assert a contrary reading of the statute, and claim that

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1. The challenged regulation was promulgated by the Immigration and Naturalization Service ("INS") in the exercise of authority delegated to it by the Attorney General. *See* 8 C.F.R. 2.1 (1991). This brief refers to the Attorney General and the INS interchangeably with respect to the scope of authority issue.

2. Petitioners are referred to herein collectively as "the INS."

their reading is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The INS's reliance on *Chevron* as a basis for deferring to the agency's interpretation is inapposite in the present case for at least three reasons. First, *Chevron* simply does not apply under the circumstances presented. Second, even if *Chevron's* analysis applies to the interpretive task at hand, Congress' intent is clear and thus deference is inappropriate. Third, even if Congress' intent were not clear, deference would be unwarranted because the agency's interpretation is impermissible and unreasonable. This brief addresses these three reasons in turn.

A. *Chevron* Does Not Apply Under the Circumstances of this Case

1. *The Chevron Standard*

Chevron established a two step process under which the courts are to ascertain whether to defer to an administrative agency's interpretation of a statute which the agency is charged with administering. It first requires an assessment of "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842-43. Where the court can ascertain Congress' intent, effect is to be given to that intent and thus the agency's views are irrelevant. *Id. See also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986) ("[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"). Where the court using the traditional tools of statutory construction cannot discern Congress' intent with respect to an issue, it is to defer to a permissible agency interpretation of the statute. 467 U.S. at 843. *See also INS v. Cardoza-Fonseca,* 480 U.S. 421, 446-48 (1987).

2. *Chevron's deference requirement applies only to some kinds of interpretive questions and only under some circumstances*

In the present case, the INS asserts that because the question before the Court involves statutory interpretation, the agency interpretation is entitled to deference under *Chevron*. Pet. Brief at 33. This ignores the fact that the term "statutory interpretation" refers to a variety of distinct interpretive tasks, some of which are appropriate for deference under *Chevron* and some of which are not. *See Cardoza-Fonseca,* 480 U.S. at 448 (differentiating between kinds of interpretive tasks in context of determining the appropriateness of deferring to agency interpretation of statutes). *See also Homemakers North Shore, Inc. v. Bowen,* 832 F.2d 408, 412 (7th Cir. 1987) (Easterbrook, J.) ("[d]ifferent statutes transfer different sorts of implementing authority to agencies, and therefore there is not one but many standards of deference when agencies interpret statutory language").

Although some uncertainty exists with respect to the precise scope of *Chevron's* deference requirement, *compare Cardoza- Fonseca,* 480 U.S. at 446-48 (majority opinion discussing the circumstances under which deference to an agency is appropriate) *with id.* at 453-455 (Scalia, J., concurring in the judgment, and disagreeing with the majority's characterization of the scope of *Chevron's* deference requirement); *see also* Anthony, *Which Agency Interpretations Should Get Judicial Deference? – A Preliminary Inquiry,* 40 Admin. L. Rev. 121, 126-27 (1988) (noting the uncertainty with respect to *Chevron's* scope); Starr, *Judicial Review in the Post-Chevron Era,* 3 Yale J. on Reg. 283, 299-300 (1986) (noting unresolved issues regarding *Chevron's* scope), the INS cannot be correct in its suggestion that *Chevron* requires deference to an agency position merely because a question of statutory interpretation is at issue. Because administrative agencies derive their authority solely from statutes, *see* Schwartz, B., *Administrative Law* 10

(3d ed. 1991) ("[t]he administrative agency is a creature of the legislature . . ."), every action taken by a federal administrative agency in some sense entails statutory interpretation. Acceptance of the INS's position would favor the virtual abdication of the courts' reviewing function with respect to administrative action. Thus, despite some language in the case which might be read to require across-the-board, unequivocal deference in the face of statutory ambiguity, the sounder reading of *Chevron* requires deference only with respect to some types of interpretive questions, and only under some circumstances. Rather than stating an absolute requirement of deference, *Chevron* simply establishes a strong preference or presumption in favor of an agency interpretation of an ambiguous statutory term, which can be overcome in an appropriate case. What constitutes an appropriate case for deference depends upon two factors: the type of interpretive question at issue and the circumstances under which the agency has acted.

The text of the *Chevron* decision supports this view. In Chevron, the decision as to whether to defer to the agency interpretation rested at least in part upon the type of interpretive task at hand and the appropriateness of deferring under the circumstances:

> In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases.

467 U.S. at 865. *See also id.* at 848 (noting that the statutes at issue "are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue."); *Cardoza-Fonseca,* 480 U.S. 421 (demonstrating

that the deference principle does not apply in every case of agency interpretation of statutes within its charge); *NLRB v. United Food & Commercial Workers' Union,* 484 U.S. 112, 123-24 n.20 (1987) (considering in determining the appropriateness of deference the consistency of the agency's interpretation with its past pronouncements).

3. *Chevron does not require deference to an agency assessment of its own authority*

As *Chevron* itself demonstrates, deference to an agency interpretation applies where the traditional tools of statutory construction fail to produce a conclusive determination of the meaning of what might be called a substantive statutory term. Where, on the other hand, the interpretive question at issue involves the scope of the agency's authority, deference is neither warranted nor appropriate.

In *Chevron,* the Court deferred to the EPA's interpretation of the term "stationary source" as it was used by Congress in the 1977 amendments to the Clean Air Act. 467 U.S. at 866. In a series of post-*Chevron* cases, the Court has applied the *Chevron* analysis to agency interpretations of such substantive provisions. *See, e.g., Department of Transp. v. Paralyzed Veterans,* 477 U.S. 597, 612-13 n.14 (1986) (applying *Chevron* to construction of the statutory term "Federal financial assistance"); *Connecticut Dep't of Income Maintenance v. Heckler,* 471 U.S. 524, 530 (1985) ("[i]n the absence of a statutory definition of the term 'institution for mental diseases,' it is appropriate to consider the Secretary's interpretation of that term."); *United States v. Boyle,* 469 U.S. 241, 246 n.4 (1985) (applying *Chevron's* deference requirement to construction of the statutory term "reasonable cause").

Properly understood, *Chevron* does not require deference when the interpretive question at issue concerns the scope of the agency's own authority. Although this distinction has been expressly addressed infrequently in this Court's case law, Justice Brennan in his dissenting

opinion in *Mississippi Power & Light v. Mississippi ex rel. Moore,* 487 U.S. 354, 387 (1988), identified the problem and properly concluded that *Chevron* deference is inappropriate where the agency has construed a statute designed to confine the scope of its own jurisdiction. While the statute at issue here cannot be so characterized, Justice Brennan's reasoning applies with equal force to the construction of statutory terms which go to the scope of the agency's authority to act.[3] A contrary reading of *Chevron* would inappropriately render the agencies the judges of their own cause. *See* Sunstein, *Judicial Review of Administrative Action in a Conservative Era,* 39 Admin. L. Rev. 353, 368 (1987) (panel discussion) (urging the rejection of a broad reading of *Chevron* in part because "those who are limited in their authority by law should not be the judge of those limits.").

This Court has demonstrated its willingness to disregard *Chevron* in a variety of interpretive contexts. For example, the Court has chosen not to refer to *Chevron's* deference requirement when construing non-substantive statutory terms concerning federal court jurisdiction to review administrative action. Thus, *McNary v. Haitian*

3. Justice Brennan noted in *Mississippi Power* that the Court has in some instances deferred to agency determinations with respect to scope of authority. 487 U.S. at 387. Such cases, however, concerned either statutes under which Congress had allocated such authority to the agency, *see Commodities Futures Trading Comm'n v. Schor,* 478 U.S. 833, 844 (1986) (the "the CFTC's long-held position that it has the power to take jurisdiction over counterclaims such as [that at issue] is eminently reasonable and *well within the scope of its delegated authority*") (emphasis added), or legislative schemes under which agency expertise is deemed to be useful in determining the scope of authority, *see NLRB v. City Disposal Systems,* 465 U.S. 822, 829-30 (1984) (relying in part on an agency expertise explanation for deferring to the NLRB's view of the scope of its authority under section 7 of the National Labor Relations Act).

Although some justices have favored application of *Chevron* to questions concerning the scope of an agency's authority, *see, e.g., Dole v. United Steelworkers of America,* 110 S. Ct. 929, 944 (1990) (White, J., dissenting); *Mississippi Power & Light Co.,* 487 U.S. at 380-82 (Scalia, J., concurring), a majority of the Court has never expressly rejected Justice Brennan's analysis.

Refugee Center, 111 S. Ct. 888, 896-97 (1991), rejects the INS's interpretation 8 U.S.C. sec. 1160(e)'s judicial review provision without reference to deference to the agency's views.[4] Similarly, in *Cardoza-Fonseca,* 480 U.S. 421, the Court carefully examines the relevant statutes' plain meaning and legislative history with no suggestion that the INS's interpretation is entitled to deference. *Id.* at 421-43. The Court then expressly rejects the INS's assertion that such deference is required. Id. at 445. It distinguishes between "pure questions[s] of statutory construction" and the application of legal terms to particular circumstances. Pure legal questions are "for the courts to decide." Thus, as was the case in *Cardoza-Fonseca* itself, no deference is to be afforded. Questions concerning the application of legal standards to given facts are at least under some circumstances allocated to the agency by Congress, and thus the courts will defer to a reasonable agency construction. *Id.* at 446-48. *See also INS v. Stevic,* 467 U.S. 407 (1984) (decision released several weeks before *Chevron* in which no deference was afforded to the INS's resolution of a pure question of law).

The principal issue before the Court in this case is whether the INS acted outside the scope of the authority allocated to the Attorney General by Congress in 8 U.S.C. sec. 1252(a)(1). *See National Center for Immigrants' Rights, Inc. v. INS,* 913 F.2d 1350, 1358 (9th Cir. 1990) (characterizing the issue as whether the challenged regulation is beyond the statutory authority conferred on the Attorney General). The INS accepts this characterization in arguing that the challenged

4. Although one could assert that *Chevron* does not apply under these circumstances because the agency is not charged with "administering" the judicial review provision at issue, *see* 467 U.S. at 842, the provision is part of the Immigration and Nationality Act, 8 U.S.C. sec. 1101 *et seq.* (1988), as amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, and thus is a part of the legislative scheme which it is the INS's principal task to administer.

regulation reflects a policy change but not a reassessment of the agency's view of its statutory authority. Pet. Brief at 34. Such questions of agency authority turn upon whether the agency's action was ultra vires and thus invalid.[5]

Under section 1252(a)(1), when an individual has been taken into custody pending a determination of deportability, the Attorney General is authorized to exercise discretion with respect to whether that individual shall remain in custody, be released under bond "containing such conditions as the Attorney General may prescribe," or be released on conditional parole. Respondents assert, and the Court of Appeals agreed, 913 F.2d at 1374, that this authority does not extend to the imposition of a blanket rule requiring "no work" conditions in release bonds.

Such disputes over whether the agency's actions were ultra vires are fundamentally different from *Chevron*-type disagreements over the meaning of a substantive term. In the latter cases, deference is a judicial response to uncertainty with respect to where Congress wished to allocate the interpretive authority with respect to a particular statutory term. In the event of such uncertainty over whether the agency or the courts have been charged with interpreting a statutory term, *Chevron* states a rule under which in some circumstances the courts will assume that Congress intended for the agency to decide. *Cf. Department of the Treasury, IRS v. FLRA,* 110 S. Ct. 1623, 1629 (1990)

5. Alternatively, the question before the Court could be cast as whether the INS abused its discretion in promulgating the work authorization regulations. Section 1252(a)(1) undoubtedly vests discretionary authority in the Attorney General – the question before the Court is whether the delegatee of that authority has abused the discretion afforded. Under these circumstances, to defer to the INS interpretation of sec. 1252 would permit the agency to determine whether or not it had abused its own discretion. Such deference would preclude meaningful judicial review of agency discretionary decisions.

("when an agency is charged with administering a statute part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities."); *Adams Fruit Co. v. Barrett,* 110 S. Ct. 1384, 1390 (1990) ("[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority."). *See also* Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 Duke L.J. 511, 516. When the interpretive task concerns the scope of the agency's authority, however, such uncertainty with respect to interpretive responsibility is not at issue. It makes little sense under such circumstances to assume that Congress intended for the agency to determine the contours of its own power. A contrary interpretation of *Chevron's* scope would violate the sound proposition that "foxes shouldn't guard henhouses." Sunstein, *supra* p. 8, at 368.

The refusal to extend *Chevron's* deference requirement where the interpretive task concerns whether the agency's action was ultra vires is sound. Because the administrative agencies do not operate under a direct grant of power from the Constitution, they are entirely dependent upon Congress for their authority. *See Chrysler Corp. v. Brown,* 441 U.S. 281, 302 (1979) ("[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."); Schwartz, B., *Administrative Law* 171 (3d ed. 1991) (noting that application of the notion of ultra vires to administrative action is "inherent in the constitutional positions of agencies and courts."). Thus the rigorous application of the ultra vires doctrine is essential to the maintenance of a government within the confines of the existing Constitution, and is well within the courts' constitutionally-established function. Given the particular importance of scope of authority questions in the agency context, the most appropriate construction of

Chevron is to limit its application to interpretive tasks which concern the meaning of a substantive statutory term where Congress has not clearly allocated interpretive responsibility. *Cf. Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) ("[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.").

Finally, application of *Chevron's* deference requirement to scope of authority questions would afford the administrative agencies a privileged status not afforded to the constitutionally established political branches. At least since *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), the courts have passed on the constitutionality of the actions of the political branches. Where the courts hold actions by Congress or the President to be unconstitutional, they are in a sense saying that the action was ultra vires, *i.e.,* that the action exceeded the actor's authority under the enabling text. For example, the Court invalidated Congress' efforts to use the legislative veto as a check on executive branch action in *INS v. Chadha,* 462 U.S. 919 (1983). Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. at 587-88, the Court precluded President Truman's efforts to seize U.S. steel mills during a labor dispute. In these cases and dozens of others, the Court displaced the political branches assessment of the scope of their own authority. *See, e.g., United States v. Eichman,* 110 S. Ct. 2404 (1990) (invalidating the federal Flag Protection Act of 1989); *Bowsher v. Synar,* 478 U.S. 714 (1986) (invalidating portion of the Gramm-Rudman-Hollings Act); *United States v. Nixon,* 418 U.S. 683 (1974) (rejecting President Nixon's characterization of the scope of executive privilege). Whatever *Chevron* means, it should not be construed so as to shield the agencies from review for ultra vires action to a greater extent than the

constitutionally-established political branches are shielded in analogous circumstances.[6]

4. *Chevron only requires deference where the circumstances warrant deference to the agency interpretation*

The INS's talismanic invocation of *Chevron* is also inappropriate because a proper application of that case looks to the circumstances before affording deference to the agency's determination.

The Court in *Chevron* expressly referred to the circumstances in explaining the deference requirement. *See* 467 U.S. at 865 (noting that the statutory amendments at issue were "technical and complex" and that the agency "considered the matter in a detailed and reasoned fashion"). Moreover, despite some categorical language in *Chevron,* this Court has routinely considered the circumstances of a given case in deciding whether deference is to be given to the agency's interpretation. In perhaps the best known example, the Court declined to apply *Chevron's* deference requirement to a pure question of law in *Cardoza-Fonseca.* 480 U.S. at 446-48. A variety of other factors, such as the complexity of the regulatory scheme at issue, the extent to which the agency interpretation is the product of agency counsel's post hoc rationalizations, and the consistency or long-standingness of the agency interpretation, have also been considered. *See, e.g., Bowen v. Georgetown*

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6. One could argue with respect to the actions of Congress and the President that the presumption in favor of the constitutionality of the political branches' actions, *INS v. Chadha,* 462 U.S. at 944 (courts begin with the presumption that Congress' acts are valid); *Dames & Moore v. Regan,* 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. at 637 (Jackson, J., concurring)) (applying same principle to presidential action), functions much like the *Chevron* deference requirement. The analogy is, however, flawed. The presumption in favor of the political branches does not result in the minimal scrutiny which frequently results under *Chevron's* reasonableness inquiry.

Univ. Hosp., 488 U.S. 204, 212-13 (1988) (declining to defer to agency interpretations which were mere litigation positions); *NLRB v. United Food & Commercial Workers' Union*, 484 U.S. 112, 123-24 n.20 (1987) (expressly considering the consistency of the agency's interpretation with its past pronouncements in determining the appropriateness of deference); *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (identifying inconsistency with past agency interpretations as additional reason for declining to defer); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986) (quoting *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985)) (referring to the statute's complexity in explaining deference to agency's interpretation); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (expressly referring to the circumstances of the case in concluding that deference should be afforded to the agency's statutory interpretation); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 528 (1985) (noting long-standingness of agency interpretation). *See also EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 125 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (noting that deference is particularly appropriate with respect to "technical issue[s] of agency procedure.").

5. *The circumstances of the present case do not warrant deference to the INS's interpretation of sec. 1252(a)(1)*

Numerous factors weigh against judicial deference to the INS's interpretation of sec. 1252(a)(1).

First, the agency's interpretation is neither consistent nor longstanding. This Court has recently stated, "as a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views". *Pauley v. Bethenergy Mines, Inc.*, 59 U.S.L.W. 4778, 4783 (June 25, 1991) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)).

Unlike in *Pauley*, the Attorney General, the Immigration Service, and the Board of Immigration Appeals have not held "unswervingly" to the view that a no work rider can be attached to immigration bonds. The Immigration and Nationality Act was passed in 1952. The Immigration Service first promulgated the regulations here at issue in 1983. Prior to that time, the Immigration Service had never promulgated a regulation, nor for that matter, taken a position in adjudications that it had the authority to impose a blanket no work rider on immigration bonds.

The Attorney General's delegate, the Board of Immigration Appeals consistently held that an alien was not to be detained or required to post bond unless he either posed a threat to national security or was a poor bail risk. *See Matter of Patel*, 15 I&N Dec. 666 (1976) and *Matter of Spiliopoulos*, 16 I&N Dec. 561 (1978). As these decisions reflect, the Board consistently held that employment was a positive factor in bond determinations as it reflected an attachment to the community which made it more likely that the alien would appear at his or her deportation hearing. The absence of employment was considered a negative factor justifying a substantial bond. *See Matter of Shaw*, 17 I&N Dec. 177 (1979). *See also Matter of Andrade*, 19 I&N Dec. 488 (1987). Thus, the Board has consistently viewed its task in bond determination proceedings to be limited to a determination of whether the alien posed a security risk or a risk of flight. A stable employment history was consistently considered a favorable factor.

In *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (BIA, 1973)(AG 1974), the Immigration Service first asserted a right to have a condition in a bond that an alien not seek or continue unauthorized employment. However, the INS assertion of this authority was based on the "peculiar factual situation" of the case. *Toscano-Rivas*, at 528. The Board held the no-work condition to be an impermissible use of the detention power.

The matter was reviewed by the Attorney General who concluded that the statute did authorize "in at least some circumstances" a bar against unauthorized employment in deportation bonds. The Attorney General also held that such conditions must be specifically governed by a published regulation of the Service. Lacking such a regulation, the Attorney General sustained the Board's decision. *Toscano-Rivas,* at 553 and 556. The Attorney General did not assert a right to no-work conditions in a bond on an across-the-board basis. Moreover, the Attorney General's decision reflects the attempt to impose such a bond rider even on a case-by-case basis as an abrupt change from past practice.

Finally, the Immigration Service has not provided a detailed and reasoned explanation so as to justify its change in policy. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Mobile Ins. Co.,* 463 U.S. 29, 57 (1983).

Second, the agency lacks expertise with respect to the purported objective of the challenged regulation, and thus one of the traditional justifications for deferring to an agency's interpretation is lacking. The INS's purported justification for the challenged regulation is the protection of the United States' labor markets from an influx of alien labor. *See* Pet. Brief at 26-27. Neither the Attorney General nor the INS have particular expertise with respect to either labor market conditions or the likely impact that the challenged regulation would have on persons seeking employment in the United States. To the extent that the INS can be said to have expertise, it is not in the area of labor economics, but in the admission of aliens into the United States.

Third, unlike *Chevron* and many of its progeny, this case does not require an analysis of technical or scientific data. The challenged regulation relates to a straightforward regulatory scheme which cannot be cast as "technical" in the *Chevron* sense of the term. In cases involving technical or scientific matters, deference is

afforded at least partly to increase the likelihood that a sound decision will be made. *See* Scalia, *supra* p. 11, at 514 (stating that where expertise is at issue the agency is thought more likely to reach the right result). Where no such data is at issue, deference does not increase the chances that the best result will be reached.

6. *Conclusion*

Properly understood, *Chevron* does not state a lock step rule of deference whenever an agency takes a position with respect to the meaning of a statute which it is charged with implementing. Instead, *Chevron* requires deference to reasonable agency interpretations of substantive statutory terms unless such deference is inappropriate or unwarranted under the circumstances. Deference to the INS's position is inappropriate in the present case on both of these grounds. First, the interpretive task does not concern a substantive term, but rather concerns whether the INS stayed within the contours of the authority afforded to the Attorney General by Congress. Second, the circumstances of this case do not favor such deference.

B. Even if *Chevron* Does Apply Under the Circumstances of this Case, Deference Should Not be Afforded to the INS's Interpretation of Section 1252(a)(1) Because Congress' Intent is Clear

Even under a *Chevron* analysis, the INS's interpretation of sec. 1252(a)(1) must be rejected because Congress' intent is clear from the text the statute, the Immigration and Nationality Act taken as a whole, and the legislative history of the relevant provisions.

Under *Chevron,* the courts are to defer to a reasonable and permissible agency interpretation of a statute only in the event of uncertainty over the statute's meaning. 467 U.S. at 844-45. Where no such uncertainty exists, effect must be given to Congress' intent and thus deference is inappropriate. *Id. See also Dole v. United Steelworkers of America,* 110 S. Ct. 929, 938

(1990). In ascertaining whether Congress' intent with respect to a given question may be discerned, the courts are to employ the traditional tools of statutory construction. *See Cardoza-Fonseca,* 480 U.S. at 446-48 ("[e]mploying the traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical."). *See also Chevron,* 467 U.S. at 843 n.9 (referring to the judiciary as the "final authority on issues of statutory construction"). This initial inquiry regarding legislative intent entails the judicial assessment of the specific provision's text, the language and design of the statute as a whole, and the statute's legislative history. *See, e.g., Sullivan v. Everhart,* 110 S. Ct. 960, 964 (1990) ("[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.") (quoting *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988)); *Regents of Univ. of Cal. v. Public Employment Rel. Bd.,* 485 U.S. 589, 597-602 (1988) (declining to defer to the agency interpretation because Congress' intent could be discerned from an analysis of statutes and their legislative history); *Bethesda Hosp. Ass'n v. Bowen,* 485 U.S. 399, 403 (1988) (declining to defer to agency interpretation where the plain meaning of the statute and the language and design of the statute indicate Congress' intent); *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 233 (1986) (noting that the courts will afford deference under Chevron "unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress."); *United States v. City of Fulton,* 475 U.S. 657, 666-67 (1986) (considering the legislative history of the relevant statute in order to ascertain Congress' intent).

1. *The statutory language*

The plain language of sec. 1252(a)(1) and sec. 1252 taken as a whole demonstrate that the INS's interpretation is inconsistent with Congress' intent with respect to bond conditions.

Section 1252(a)(1) addresses the scope of the Attorney General's authority with respect to the arrest, custody and release of persons subjected to deportation proceedings. It provides the Attorney General with considerable flexibility in determining whether a given individual will remain in custody, be released under bond, or released on conditional parole. With respect to release on bond, sec. 1252(a)(1) permits the inclusion in such bonds of "such conditions as the Attorney General may prescribe . . ." The INS reads this authority broadly, claiming that bond conditions need only be rationally related to the purposes of the immigration laws. *See* Pet. Brief at 14 (asserting that sec. 1252(a)(1) authorizes those conditions "designed to serve any of the policies of the Immigration and Nationality Act.").

The INS's interpretation is cut from whole cloth. It ignores the plain meaning of the terms "bond" and "discretion," and it fails to consider the bond conditions provision in the context of sec. 1252 as a whole.

The plain meaning of the term "bond" as used in sec. 1252(a)(1) establishes Congress' intent with respect to the kinds of release conditions which the Attorney General may impose. *Black's Law Dictionary's* definition of "bond" in the context of detention or incarceration refers to its definition of "bail." "Bail" is repeatedly defined in terms of ensuring an individual's appearance at later proceedings. For example, "bail" is defined as "[t]o procure release of one charged with an offense by insuring his future attendance in court and compelling him to remain within jurisdiction of court." *Black's Law Dictionary* 127-28 (5th ed. 1979). In differentiating between civil and criminal bail, it states that "[t]he object of 'bail' in civil cases is either directly or indirectly to secure payment of a debt or performance of

other civil duties, while in criminal cases object is to secure appearance of principal before the court when his presence is needed."[7] *Id.*

This Court's case law is consistent with this understanding of the term "bond." *Yanish v. Barber,* 73 S. Ct. 1105 (Douglas, Circuit Justice 1953), concerned the scope of the Attorney General's discretion to impose bond conditions under 8 U.S.C. sec. 1252(c). Section 1252(c), a provision analogous to sec. 1252(a)(1), concerns the treatment of persons subject to deportation proceedings after a final order of deportation has been entered. The bond condition language in the two provisions is identical.[8]

In *Yanish,* the subject of deportation proceedings had been free on bond pending resolution of the proceedings. The INS requested that he execute a bond containing new conditions, including several which related to association with communist organizations or with persons who associate with such organizations. When the alien refused to execute the new bond, he was taken into custody. He filed a petition for habeas corpus, alleging that the Attorney General had abused his discretion in seeking to impose the new bond conditions. The district court rejected the petition, and denied bail pending appeal. The issue before Justice Douglas was whether the appeal raised a "substantial question," in which case bail pending appeal should be allowed. *Id.* at 1106-07. In explaining his conclusion that the questions raised were substantial, Justice Douglas first noted that "[t]he function of bail in situations such as the instant

7. Although deportation proceedings are civil in nature, *see Carlson v. Landon,* 342 U.S. 524, 533 (1952), the incarceration and hence the bonding process is more closely analogous to criminal practice.

8. Both sec. 1252(a)(1) and sec. 1252(c) refer to release on bond "containing such conditions as the Attorney General may prescribe." The INS concedes that under sec. 1252(c) "the Attorney General retains the same authority to detain or to impose conditions as under subsection (a)(1)." Pet. Brief at p. 16 n.8.

one is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal, on the other." *Id.* at 1108. He then questioned how the imposition of conditions related to the alien's associational activities could further the purpose of bail. *Id.* at 1108. *See also In re Milburn,* 34 U.S. (9 Pet.) 704, 709 (1835) (Story, J.) (emphasizing that the purpose of bond in the criminal context is to ensure a party's appearance at later proceedings); *Reynolds v. United States,* 80 S. Ct. 30, 32 (Douglas, Circuit Justice 1959) ("[t]he purpose of bail is to insure the defendant's appearance and submission to the judgment of the court."). *Cf. Rubenstein v. Brownell,* 206 F.2d 449, 456 (D.C. Cir. 1953) (noting in the context of the Attorney General's authority to arrest persons under sec. 1252 that imprisonment on the basis of the appellant's criminal record or his unpopularity would constitute an abuse of discretion), *aff'd per curiam by an equally divided Court,* 346 U.S. 929 (1954).

In using the term "bond" in sec. 1252(a)(1), Congress can be presumed to have known that bond conditions in this context refers to conditions intended to secure appearance at later proceedings. The INS construes sec. 1252(a)(1) to afford the Attorney General the ability to detain persons whose status has yet to be ascertained for undetermined lengths of time in order to further any permissible objective of the immigration laws. When the plain meaning of "bond" as used in this context is considered, this interpretation is absurd.

The INS also failed to read the bond condition provision in context. It is apparent from sec. 1252 taken as a whole, which is concerned with the procedures to be followed in the event that an individual is to be the subject of deportation proceedings, that the conditions imposed must be related to ensuring the individual's later appearance. Nothing in sec. 1252's detailed provisions supports the view that the procedural devices

outlined may be used as the Attorney General sees fit to further any of the myriad purposes of the immigration laws.

This understanding of "bond" is consistent with the legislative history of a predecessor bill to the 1950 legislation which contained the present sec. 1252(a)(1). Both the House and Senate reports on that bill referred to the Attorney General's "untrammeled" authority to impose bond conditions, but went on to list as examples conditions that were to be applied on an individualized basis and which only concerned either ensuring appearance at the hearing or the amount of the bond. H.R. Rep. No. 1192, 81st Cong., 1st Sess. at 6 (1949); S. Rep. No. 2239, 21st Cong., 2d Sess. at 5 (1950) (cited in *National Center for Immigrants' Rights, Inc.*, 913 F.2d at 1359).

The INS's interpretation is also inconsistent with the plain meaning of the term "discretion" as that term is used in sec. 1252(a)(1). "Discretion" by definition when used in this context requires some individualized consideration of the circumstances surrounding the person being subjected to deportation proceedings. *See Cardoza-Fonseca,* 480 U.S. at 444 (referring to the Attorney General's discretion to grant asylum as a congressional assignment of "the task of making these hard individualized decisions"). *See also Black's Law Dictionary* 419 (5th ed. 1979) (defining discretion as applied to public officers as the "power to act in an official capacity in a manner which appears to be just and proper *under the circumstances")* (emphasis added).[9]

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9. This definition of deference as requiring an individualized assessment is consistent with the cases relied upon by the INS in support of its assertion that an agency may use rulemaking to resolve questions of general applicability even where individualized determinations are required. Pet. Brief at 38-41. The cases cited by the INS are distinguishable because they involved questions of general applicability which were relevant to the requisite individualized determinations. *See, e.g., Heckler v. Campbell,* 461 U.S. 458, 467 (1983) (permitting resolution of questions concerning the availability of employment in the national economy through rulemaking in the context of individual disability determinations). The regulation challenged in the present case does not concern questions of general applicability. Instead, it ignores individual circumstances and imposes a blanket prohibition regardless of circumstances. The cases cited by the INS do not support such agency action.

This understanding is consistent with the Court of Appeals' construction of the scope of the Attorney General's discretion under sec. 1252(a)(1). The court discerned from a thorough review of the case law on the scope of the discretion at issue "an unmistakable emphasis on the situation of each individual as the focus of the exercise of discretion." 913 F.2d at 1363-64. The court stated further that "[t]he significant power which is placed in the Attorney General must be exercised on the specific, individual circumstances of the person who faces the determination of his alienage or deportability under this statutory section." *Id.* Finally, the court concluded by noting that "[i]nformed discretion is incompatible with a blanket no- work rule." *Id.* at 1374. *See also Carlson v. Landon,* 186 F.2d 183, 188-89 (9th Cir. 1950), *aff'd on other grounds,* 342 U.S. 524 (1952) (requiring an individualized assessment in the exercise of the Attorney General's discretion under the Internal Security Act with respect to release under bond). Moreover, this Court has accepted an analogous argument in the Social Security disability context. *See Sullivan v. Zebley,* 110 S. Ct. 885 (1990) (relying upon Congress' intent to provide for individualized determinations in rejecting agency's efforts to make disability determinations through rulemaking process).

Thus, the challenged regulation is inconsistent with Congress' clear intent in a variety of respects. It ignores the plain meaning of the terms "bond" and "discretion," and ignores the context in which sec. 1252(a)(1) affords discretion to the Attorney General with respect to bond conditions.

2. *Section 1252(a)(1)'s role in the Immigration and Nationality Act as a whole and the legislative history*

Section 1252(a)(1) is part of the extensive federal immigration and naturalization regulatory scheme which is largely contained in the Immigration and Nationality Act, 8 U.S.C. sec. 1101 *et seq.* ("the INA"). The INS's interpretation of sec. 1252(a)(1) is inconsistent with the language and structure of the INA, particularly with the employment-related amendments to the INA contained in the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359.

As the INS conceded in its commentary on the challenged regulation, persons who violate the no work condition of a release bond would be incarcerated. *See* 48 Fed. Reg. 51142 ("[w]here the 'no work' condition is violated, the appropriate response would be to take the alien into custody.") Thus, the INS interprets sec. 1252(a)(1) to permit the punishment of the individual for violation of a "no work" condition. Moreover, even absent re-incarceration for violation of a bond condition, the blanket rule requiring no work conditions is likely to make obtaining release from detention more difficult. *See National Center for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1357 n.7 & accompanying text (9th Cir. 1990). This interpretation of sec. 1252(a)(1) is flatly inconsistent with Congress' intent with respect to unauthorized work by aliens.

Both the employment-related provisions and the legislative history of IRCA demonstrate Congress' intent to limit unauthorized employment not through penalizing the alien worker, but through employer sanctions. The Court of Appeals described the relevant portions of IRCA and its underlying policy as follows:

> [T]he principal sanctions in IRCA are aimed at employers. Section 101 of the Act establishes penalties making employment of unauthorized aliens unlawful. 8 U.S.C. sec. 1324a. The employer is required to keep records of the verification of employees' eligibility to work. 8 U.S.C. sec. 1324a(b)(1)(C). Civil and criminal penalties are provided for violations. 8 U.S.C. sec. 1324a(e), (f).

913 F.2d at 1367.

The Court of Appeals, after carefully summarizing IRCA's legislative history with respect to unauthorized employment, properly concluded that IRCA did not authorize the Attorney General to promulgate the challenged regulation. *Id.* at 1366-70.

C. Even if the Court Concludes that sec. 1252(a)(1) is Ambiguous with Respect to the Attorney General's Authority to Impose a Blanket Condition Unrelated to Assuring Appearance at the Hearing, the INS's Interpretation Should be Rejected as Impermissible and Unreasonable

Even if the Court concludes that *Chevron* does apply to the type of interpretive questions at issue and that sec. 1252(a)(1) is ambiguous with respect to the Attorney General's authority, it should reject the agency's interpretation as both unreasonable and impermissible.

In assessing the reasonableness of the agency's interpretation, the Court is to consider that interpretation "in light of the language, policies, and legislative history of the [statute] . . ." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). Given that the reasonableness inquiry largely looks to the same factors as those considered in the first part of the *Chevron* analysis, amicus curiae refers to the foregoing discussion to demonstrate that the INS's interpretation is unreasonable. *See* supra at 17, 18, and 19.

Additionally, the INS's interpretation of sec. 1252(a)(1) is unreasonable for reasons unrelated to issues of legislative intent. For example, although the purported justification for the no work authorization is to preserve employment opportunities for U.S. citizens by creating a disincentive to those who wish to travel to the

United States to obtain employment, *see* Pet. Brief at 6 ("[b]y placing the burden on these aliens, INS intends to remove an economic incentive for illegal entry, and also to remove an incentive to delay deportation proceedings when an alien is apprehended."), the empirical data belies this explanation. As the Court of Appeals noted, the "no work" condition regulation affects only a small percentage of those who come to the United States to seek employment. Over 97% of those arrested by the INS take voluntary departure and depart from the United States without a hearing. 913 F.2d at 1369 (citing *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1044 (1989)). Moreover, a portion of those remaining are released on parole rather than bond. *Id.* Thus, the percentage of persons who would be directly affected by the challenged regulation is quite small. When the impact of this small percentage on the incentive effect is considered in conjunction with the questionable constitutionality of the challenged regulation, the regulation cannot be cast as reasonable. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council,* 485 U.S. 568, 574-76 (1988).

Despite the INS's routine invocation of *Chevron,* a proper reading of *Chevron* and its progeny demonstrates that *Chevron's* deference requirement simply is not implicated in this case. Deference would be inappropriate and unwarranted here for at least two reasons. First, interpretive questions regarding the scope of an agency's authority are better resolved by an entity not charged with exercising the power at issue. Second, the circumstances here do not warrant or even favor deference to the INS's interpretation of sec. 1252(a)(1). Moreover, even if *Chevron* applies, Congress' intent is clear from the face of the statute, the INA considered in its entirety, and the relevant legislative history. As Chevron notes, "that is the end of the matter," 467 U.S. at 842, and the agency interpretation is not relevant. Finally, even if the Court finds sec. 1252(a)(1) to be ambiguous with respect to the scope of the agency's

authority, deference should not be afforded because the agency interpretation is both impermissible and unreasonable.

Finally, the regulation is tantamount to an outright denial of employment authorization to all aliens during the pendency of deportation proceedings. The Immigration Service's regulations automatically terminate the employment authorization of all aliens placed in exclusion or deportation proceedings. *See* 8 C.F.R. § 274(a)(1)(ii). Thus, the petitioner's assertion that the no-work bond condition does not eliminate preexisting rights to work either incident to status or by grant of the Immigration Service, is dubious at best. See Petition for Writ of Certiorari, at page 20.

The regulations do permit an application to be filed pursuant to 8 C.F.R. § 274a.12(c)(13) where the District Director determines employment is appropriate. The Immigration Service has up to 60 days to adjudicate the request.

Further, 8 C.F.R. § 103.6(a)(2)(ii) establishes separate criteria requiring that the alien demonstrate "compelling reasons" for seeking employment.

Under the standards set forth in 8 C.F.R. § 274(e), the Immigration Service has demonstrated a failure to comply with its own regulations as to timeliness and the substance of the adjudications. *See, e.g., John Doe I v. Meese,* 690 F. Supp. 1572 (S.D. Tex. 1988) (failure to comply with 60 day deadline resulting in preliminary injunction). *See also Ramos v. Thornburgh,* 732 F. Supp. 609 (E.D. Tex. 1989)(asylum applicants denied employment authorization because of INS application of the regulatory standard).

Lastly, it is clear that the "compelling reasons" standard is unreasonable as it relates to no legitimate purpose. The standard acts simply to deny to the alien the means to remain in the United States to litigate the merits of his or her case. Deportation cases are often complex with the availability of numerous types of discretionary relief provided under the Immigration Act.

The coercive effect of the INS policy is apparent. It is plainly unreasonable and not related to any legitimate interest of the Immigration Service.

CONCLUSION

Amicus American Immigration Lawyers Association urge that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAWRENCE H. RUDNICK, Esquire, hereby certify that a true and correct copy of our BRIEF AMICUS CURIAE was served upon Kenneth W. Starr, Solicitor General, Office of the Solicitor General,.Washington, DC 20530, and Peter Schay, NCIR, Inc., 256 S. Occidental Blvd., Los Angeles, CA 90057.

Service was by prepaid First Class Mail.

July 12, 1991

LAWRENCE H. RUDNICK